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No. (1)

Supreme Court, U.S.
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In The Supreme Court of the United States

RONALD W. COTTRELL AND IVY WILLIAMS,

Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Cottrell and Williams, former assistant football coaches at the University of Alabama, were pulled into an investigation of the football program by the National Collegiate Athletic Association ("NCAA"). The Alabama Supreme Court noted that the coaches were "caught up in the controversy against [their] will" and that they complied with a "gag order" imposed by NCAA rules. This Court has recognized that the "first remedy of any victim of defamation is self-help," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974), and that public figures are more limited than private figures in their legal remedy against defamation as private figures because they have the "ability to resort to effective 'self-help'" to "counter criticism and expose the falsehood and fallacies of defamatory statements." *Wolston v. Reader's Digest Ass'n,* 443 U.S. 157, 164 (1979). The NCAA gag order precluded the coaches from speaking out publicly or even answering reporters' questions during the investigation and thus prevented them from acting in any way consistent with public figure status to protect their reputations after being defamed. **Did the Alabama Supreme Court violate the First Amendment framework for defamation cases by holding, despite Cottrell's and Williams's strict compliance with the NCAA gag order, that they were "limited purpose public figures?"**

II. During the NCAA investigation, news reporters in Alabama published false and defamatory information regarding Cottrell and Williams and attributed it to "sources close to the NCAA investigation." An Alabama statute prohibited discovery from news reporters of the identity of the sources. However, the coaches

QUESTIONS PRESENTED FOR REVIEW – Continued

demonstrated through indirect evidence that the NCAA and the other defendants were alone in having the means, motive, and the opportunity to leak the falsehoods to the media. Yet the Alabama Supreme Court held that Cottrell and Williams needed to present direct evidence that the defendants were the source of the published information in order for coaches to avoid an adverse judgment as a matter of law on their "media leak" defamation claims. **Did the Alabama Supreme Court violate Cottrell's and Williams's rights to due process of law under the Fourteenth Amendment by setting an evidentiary burden in their case that could not be met because of the statutory bar?**

PARTIES TO THE PROCEEDINGS

Petitioners:

Ronald W. Cottrell

Ivy Williams

Respondents:

National Collegiate Athletic Association ("NCAA")

Richard Johanningmeier, an NCAA employee

Thomas Yeager, an NCAA employee

Thomas Culpepper, a "secret witness" for the NCAA

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OPINIONS BELOW

The opinion of the Alabama Supreme Court in *Ronald W. Cottrell and Ivy Williams v. National Collegiate Athletic Ass'n, et al.,* [Ms. 104158 and 1050436, June 1, 2007] __ So.2d __ (Ala. 2007), is set forth in App. A, beginning at App. 1. The opinion affirmed in part and reversed in part the order of the Circuit Court of Tuscaloosa County, Alabama. The effect of the Alabama Supreme Court opinion was to dispose of the majority of Cottrell's and Williams's claims and leave for a new trial only a narrow defamation claim of Ronald Cottrell against only one of the defendants, Thomas Culpepper.

JURISDICTION OF THE COURT

The Court has jurisdiction to review this matter pursuant to 28 U.S.C. § 1257(a) to decide whether the Alabama Supreme Court violated the Petitioners' rights under the First Amendment to the United States Constitution, as well as Petitioners' rights under the Due Process Clause of the Fourteenth Amendment to the Constitution. The judgment of the Alabama Supreme Court was entered on June 1, 2007. This Petition, filed within 90 days of that judgment, is timely.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are: Amendment I and Amendment XIV, § 1 of the United States Constitution. These provisions are set forth in App. D at App. 1.

STATEMENT OF THE CASE

I. BACKGROUND FACTUAL SUMMARY

When Ronnie Cottrell was hired by the University of Alabama ("Alabama") in 1997 to be one of the football team's assistant coaches, his future appeared very bright. App. E at App. 132. The same was true for Ivy Williams when he was hired as an assistant coach by Alabama a few

years earlier in 1994. However, by 2001 both men were out of college coaching when the entire Alabama coaching staff was released following a losing season and the initiation of a National Collegiate Athletic Association ("NCAA") investigation of the Alabama football program that began in late 2000. Unlike the many other college assistant football coaches that have been involved in an investigation by the NCAA and then gone on to successfully continue their coaching careers after being cleared of allegations of major rules violations, Cottrell's and Williams's reputations were purposefully ruined by a conspiracy of persons inside and outside the NCAA. They have since been unable to resume their once-promising college coaching careers.

Since 2001, Cottrell worked for a time as a high school football coach in rural Alabama, but now toils in obscurity entirely out of the coaching profession. Williams worked for a time as an assistant football coach at a small Georgia college, then he worked in Alabama high school coaching and is now an assistant coach at a junior college in Oklahoma. Both men earn only a fraction of what they previously made a decade before while assistant coaches at Alabama, and certainly do not earn what they could earn if their reputations had not been injured by the actions of the defendants in the case below.

The NCAA's investigation of the Alabama football program for violations of rules related to recruiting high school players was focused almost entirely upon the actions of Logan Young, a prominent "booster" of the program who was found to have paid the head football coach of a Memphis, Tennessee high school an astounding sum of money to have a player named Albert Means accept an athletic scholarship to play for Alabama. *Id.* at App. 132-34. However, in order to prove their case, the NCAA needed evidence and needed to be able to tie Young's actions to the Alabama football program. For evidence against Young, the NCAA's investigator Richard Johanningmeier (with the help of Phillip Fulmer, the football coach of one of Alabama's rivals) convinced Tom Culpepper, a reporter for an internet sports web site and other sports information venues, to become a "secret witness." *Id.* at App. 135-36. Culpepper had knowledge of Young's boasting that he had "bought" certain

Memphis football players for Alabama. *Id.* Yet the NCAA could not tie Young's individual actions to anyone in the Alabama football program, so in his zeal Johanningmeier targeted Cottrell, the "recruiting coordinator," and Williams, whose duties included recruiting high school players in the Memphis area, to be the "fall guys." The NCAA was greatly aided in its effort by Culpepper, who made no secret that he held a deep personal grudge against Cottrell and freely told persons he hoped to destroy Cottrell's coaching career. *Id.* at App. 137-38. Culpepper repeatedly made false and defamatory falsehoods about both Cottrell and Williams to others, including several media members. *Id.* at App. 137-40.

During the NCAA investigation of the Alabama football program that began in November 1999, NCAA Bylaw 32.1.4 required that all involved, including Cottrell and Williams, keep all information about the investigation confidential. App. D at App. 107. This bylaw was acknowledged by the courts below to be a strict "gag order" prohibiting anyone from speaking publicly or to news media regarding the investigation. While Cottrell and Williams were forced to remain silent because of the NCAA gag order, newspapers began publishing stories with information attributed to "sources close to the NCAA investigation." App. A at App. 81. Many of these stories presented Cottrell and Williams in a false light and even contained defamatory falsehoods that made it appear they were guilty of major rules violations. *Id.* However, because of the gag order imposed upon them by the NCAA, Cottrell and Williams could not and did not respond to media questioning nor otherwise speak publicly to defend their reputations and influence the outcome of the public controversy. Although the February 2002 NCAA Report on Infractions cleared Cottrell and Williams of any major rules violations in the recruitment of Albert Means, *Id.* at App. 142, their reputations among the public, their coaching peers, and college officials had already been ruined by more than a year of repeated attack to which they frustratingly had been unable to respond because of the NCAA gag order.

In addition to its written Report on Infractions, in February 2002 the NCAA also published on its publicly-accessible

internet web site a "penalty summary" relating to its investigation of the Alabama football program. The penalty summary contained admittedly false and defamatory information implying that Cottrell and Williams had had a "show cause order" placed on them, such that for a period of eight years they could not be hired by an NCAA member institution without NCAA permission.[1] *Id.* at App. 142-43, 156-57. These damaging falsehoods were republished on the web site each day for month after month and were available to the public, their coaching peers, and potential employers for nearly three years until Cottrell and Williams discovered them and demanded their removal. *Id.* at App. 157-59. While it is not known exactly how many thousands or tens of thousands of times these defamatory falsehoods were viewed, the NCAA's limited data demonstrated that during a short three month period beginning more than a year after the initial publication, the penalty summary internet web page pertaining solely to the Alabama investigation was accessed by the public 2,217 times. App. F at App. 331.

II. TRIAL COURT LITIGATION

In late 2002, Cottrell filed suit against the NCAA, Johanningmeier, Yeager, Culpepper, and others in the Circuit Court of Montgomery County, Alabama, for libel, slander, defamation, false light invasion of privacy, wantonness, and

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[1] The NCAA issued a press release on the same date as it issued its Report on Infractions. Despite not finding Cottrell or Williams guilty of any major violations relating to the recruitment of Albert Means, nor placing any penalties on them in the Report on Infractions, the press release contained the following damaging statement which exemplifies the NCAA's gratuitous hostility to the coaches:

> [T]he committee considered imposing a show cause order on one of the former Alabama assistant coaches but decided not to do so because he was terminated by the university at the conclusion of the 2000 season and since that time has been out of college coaching, under what the committee considered to be a *de facto* show cause order.

App. E at App. 142.

civil conspiracy (hereinafter the claims are collectively referred to as "defamation claims"). App. E at App. 117. The court granted a defense motion and transferred the case to the Circuit Court of Tuscaloosa County, where the University of Alabama is located. *Id.* The complaint was amended to add Williams as a plaintiff, and other defendants were dismissed. *Id.* at App. 118.

On the eve of trial, in July 2005, the circuit court granted in part and denied in part the defense motions for summary judgment. *Id.* at App. 123-24. The court held that Cottrell was a limited purpose public figure, but that Williams was a private figure. *Id.* at App. 124. Most notably, the court granted summary judgment to the defendants on the claims against them based upon alleged "leaks" of defamatory falsehoods about Cottrell and Williams to the news media during the NCAA investigation and while the coaches were under the NCAA gag order. The only claims that went to trial were defamation claims by Cottrell and Williams against Culpepper, and defamation claims by Williams against the NCAA relating to the falsehoods published in the Alabama penalty summary on the internet web site. *Id.*

During trial and after the coaches had put on their case, the court reversed its pretrial ruling, held that Williams was a limited purpose public figure, and granted a judgment as a matter of law to the defendants. *Id.* at App. 126. Based on the nature of Cottrell's defamation claims against Culpepper that were to be submitted to the jury, the court reversed its pretrial ruling that Cottrell was a limited purpose public figure and held he was a private figure as to those claims. *Id.* The jury returned a substantial verdict in Cottrell's favor awarding both compensatory and punitive damages. *Id.* Thereafter, Cottrell sought a jury trial on the issue of whether an indemnity agreement between Culpepper and the NCAA applied to cover the jury verdict. *Id.* at App. 127. However, the circuit court granted Culpepper's motion for new trial and no such trial was held. App. C at App. 103.

III. APPEAL BELOW

Cottrell and Williams filed a timely notice of appeal to the Alabama Supreme Court. They appealed the rulings of the Tuscaloosa Circuit Court that had granted judgments as a matter of law in favor of the defendants, as well as the ruling which granted a new trial on Cottrell's claims against Culpepper. App. E at App. 129-30. They also sought an order from the Alabama Supreme Court requiring the recusal of the trial judge in any further proceedings, based upon evidence of improper *ex parte* communications between the judge and counsel for the NCAA defendants, as well as other improper judicial conduct. *Id.* at App. 218-20. Defendant Culpepper cross-appealed from the circuit court's denial of his motion for judgment as a matter of law on certain claims brought against him by Cottrell that had been ordered to a new trial.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted to address what is to this Honorable Court a *question of first impression* of First Amendment defamation law, as well as a second related question, also of first impression, regarding the Due Process Clause of the Fourteenth Amendment. This Court's First Amendment opinions such as *Gertz v. Robert Welch, Inc.*, 418 U.S. 223, 345 (1974), describe the nature of the relationship of the First Amendment to defamation common law and have established that the standard for a defendant's liability is based upon the status of the plaintiff and whether or not he is a public official or public figure. This Court has further established that whether a plaintiff is considered a public figure is principally based on two factors: (1) whether the plaintiff voluntarily assumed a public life, and (2) the degree of his or her ability to access public media to counteract the defamatory statements and influence the outcome of a public controversy.

However, this Court has never addressed the Constitutional status of a plaintiff as a public figure where the second and arguably most important factor – the plaintiff's opportunity to use media

access to protect his reputation at the time of defamation and thus influence the public's perception of him and the public controversy – is entirely precluded by some action of the defendant or another entity. The issue is ripe for review in this case where it is undisputed that an NCAA bylaw imposed a strict "gag order" on Cottrell and Williams during its investigation of the Alabama football program and, as noted by the trial court and Alabama Supreme Court, the coaches fully complied with the order despite their natural desire to respond publicly to correct defamatory statements and thus protect their professional and personal reputations.[2]

Certiorari should also be granted as to the second issue of Constitutional due process arising from one of Cottrell's and Williams's two defamation claims at issue in this Petition. In holding that the coaches had not presented substantial evidence in support of their claim alleging that the NCAA defendants and "secret witness" Culpepper had conspired to leak defamatory falsehoods about them to newspersons, the Alabama Supreme Court failed to consider the negative effect of, or even reference, the statutory privilege that they had argued to the court, Ala. Code 1975, § 12-21-142. The court instead applied a burden of proof that required them to present evidence from the news reporters directly naming one or more of the defendants as the source. Thus, this Petition presents the opportunity for this Court to address the issue of how the Due Process Clause of the Fourteenth Amendment applies to a plaintiff's evidentiary burden when the type of evidence a state court insists is necessary is actually barred by the state itself. Here, the only evidence available to Cottrell and Williams to prove their claim was the indirect evidence they presented of the defendants' means, motive, and opportunity to commit the

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[2] The effect of a gag order or other imposed restraint on a defamation plaintiff's possible media access has been discussed by just a few lower courts, though it is an issue which is highly likely to arise again.

defamation, but which the Alabama Supreme Court refused to allow a jury to consider.[3]

ARGUMENT

I. INTRODUCTION

More than forty years ago, in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), this Court reversed a ruling of the Alabama Supreme Court and defined the extent to which defamatory speech about a public figure was protected by the First Amendment. This Court established that a defendant in a defamation case could not be held liable where the plaintiff was a public official unless the defendant acted with "actual malice." *Id.* at 279-80. Just three years later in *Curtis Publishing Co. v. Butts*, 388 U.S. 13 (1967), this Court held that the same "actual malice" standard also applied where the plaintiff, a well-known former head coach of the University of Georgia football team who was then the athletic director, was deemed to be a "public figure." Then in *Gertz v. Robert Welch, Inc.*, 418 U.S. 223, 345 (1974), this Court stated that there were two types of public figures, those who were public figures for "all purposes," and those who achieved such status in the limited context of a particular public controversy by "thrust[ing] themselves to the forefront" of the controversy in order to influence its outcome.

Certiorari should be granted here to once again reverse an erroneous First Amendment ruling of the Supreme Court of Alabama, and to hold that where a defamation plaintiff, who like Cottrell and Williams is neither a public official nor a

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[3] Under Alabama law, the State may prove even the crime of murder to the highest standard of beyond a reasonable doubt solely through circumstantial evidence of means, motive, and opportunity by the defendant to commit the act. *See, e.g., Dossey v. State*, 489 So. 2d 662, 667 (Ala. Crim. App. 1986). But under the holding of the opinion below, a defamation claim against the originator of the falsehood cannot be established in that manner even where there is state statutory privilege clothing a news reporter's knowledge of that information in absolute secrecy.

general purpose public figure, is barred by a defendant from the ability to use self-help to protect his reputation through access to the media or other use of a public voice, such plaintiff must be considered a private figure to whom the *New York Times* actual malice standard simply does not apply. Given that the NCAA gag order prevented Cottrell and Williams from even responding to reporters when sought out and asked for comment, they had even *less* ability than private figures to protect their reputations and thus cannot equitably be burdened with the status of limited purpose public figures. Without the protection of such a principle, the NCAA can silence all persons under its authority and defame them without redress.

II. COTTRELL AND WILLIAMS ARE "PRIVATE FIGURE" DEFAMATION PLAINTIFFS AS TO THEIR "MEDIA LEAK" CLAIMS[4]

This Court's opinions provide two justifications for advancing First Amendment protections to defamatory speech against public officials, general purpose public figures, and limited purpose public figures. First, this Court has stated that public officials and public figures are less deserving of protection from defamatory speech because they have voluntarily exposed themselves to an increased risk of injury from such speech. *See Gertz,* 418 U.S. at 345; *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 164 (1979). Second, this Court has noted that public officials and public figures are less susceptible to injury to their reputation from defamatory speech because, consistent with their public life or

[4] Two of the Plaintiffs' defamation claims are at issue in this Petition. As noted in the Statement of the Case, *supra*, the first claim is based upon a conspiracy involving all the Defendants to leak false and defamatory information regarding the Plaintiffs to the media during the period of the NCAA investigation. The second defamation claim is based upon the NCAA's actions in publishing false and defamatory information regarding the Plaintiffs on its internet web site immediately following the release of its Report on Infractions at the close of its investigation of Alabama for rules violations, and then maintaining such false information on the web site for a protracted period of time.

public actions seeking to influence a controversy, they have ready access to the media and thus are more able than private persons to effectively counter criticisms and expose falsehoods. *Gertz,* 418 U.S. at 344; *Wolston,* 443 U.S. at 164.

In a statement reflective of the long tradition in American jurisprudence of personal responsibility requiring that aggrieved parties act to mitigate their damages, this Court stated in *Gertz* that "[t]he first remedy of any victim of defamation is self-help using available opportunities to contradict the lie or correct the error and thereby minimize its adverse impact on reputation." 418 U.S. at 344.[5] The *Gertz* court further acknowledged that public figures are better able to engage in such self-help than are private figures:

> Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.

418 U.S. at 344. *See Butts,* 388 U.S. at 154; *Hutchison v. Proxmire*, 443 U.S. 111, 136 (1979). This special characteristic of public figures was also noted by this Court in *Wolston*:

> [W]e recognized that public figures are less vulnerable to injury from defamatory statements because of their ability to resort to effective "self-help." They usually enjoy significantly greater access than private individuals to channels of effective communication, which enable them through

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[5] The concept of a counter-speech remedy was artfully expressed by Justice Brandeis in his special concurrence in *Whitney v. California,* 274 U.S. 357, 377 (1927), where he explained: "If there be time to expose through discussion the falsehoods and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."

> discussion to counter criticism and expose the falsehood and fallacies of defamatory statements.

443 U.S. at 164. Thus, this Court's foundational opinions regarding the First Amendment and defamatory speech recognize that both general purpose public figures and limited purpose public figures do not engender the same level of protection in the law from defamatory statements because they have, through the prominence in society, achieved the unique and powerful ability to defend their reputation in the public media that private figures simply do not possess. **Therefore, just as media access is a characteristic of public figure status, the *absence* of such opportunity for a defamed person to publicly answer critics and defend his reputation must logically be a defining characteristic of private figures.**

The facts of this case demonstrate that a gag order that was imposed upon Cottrell and Williams by the NCAA during the period of the investigation rendered the coaches powerless to engage in self-help to protect their reputations at the most critical time, when their reputations were under attack in the media as a result of the defendants' "leak" of defamatory falsehoods to the media.[6] This Honorable Court should clarify that under the First Amendment framework for defamation actions, the NCAA gag order imposed upon, and observed by, these assistant coaches vested them with the characteristics of mere private figures, and that the Alabama Supreme Court ruling has violated the First Amendment in holding otherwise.

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[6] The deleterious effect of the NCAA gag order on Cottrell and Williams did not end when it was lifted in February 2002 when the NCAA released its Report on Infractions relating to Alabama and closed the investigation. By that time, Cottrell and Williams were no longer Division I college football assistant coaches and had long faded from public view and permanent damage to their reputations had already been inflicted. Because of the existing damage to their reputation, when the NCAA subsequently published false and defamatory statements about them on its internet web site, those lies were more easily believed by the thousands of persons that viewed that web page.

A. NCAA Bylaw 32.1.4 was a "gag order"

Although Cottrell and Williams may have had a limited degree of media access in their years as assistant coaches for the Alabama football team (and indisputably not the kind and level of access enjoyed by a head coach), once the NCAA began its investigation in November 2000, they were under a strict order imposed by Bylaw 32.1.4 of the NCAA Division I Manual to maintain the confidentiality of the investigation and not to speak publicly about any aspect of it. App. D at App. 107. Both the trial court, App. B at App. 96, and the Alabama Supreme Court recognized the effect of Bylaw 32.1.4 to be a "gag order" which "prevented Cottrell and Williams from discussing their role in the NCAA investigation with the press." App. A at App. 54. The NCAA enforced this bylaw by threat of an "unethical conduct" sanction if it was violated. App. E at App. 193. The NCAA gag order applied to Cottrell and Williams until the NCAA released its Report on Infractions regarding its investigation of Alabama in February 2002.

B. The Alabama Supreme Court's reasoning for holding that Cottrell and Williams were limited purpose public figures violates the First Amendment framework established by this Court for defamation claims

The Alabama Supreme Court held that Cottrell and Williams were limited purpose public figures whose defamation claims involving the NCAA were subject to the *New York Times* actual malice standard. The court made this ruling despite the fact that these assistant coaches never commented on any public controversy and despite recognizing that the NCAA gag order eliminated any opportunity they would have had to counter defamatory statements and protect their reputations at the time their reputations were most vulnerable. App. A at App. 54. The court concluded that the effect of the gag order was merely one factor of many to consider in determining the status of the Plaintiffs, and that it was outweighed by the court's own conclusions that Cottrell and Williams had (1) "injected themselves into

the public controversy," *id.* at App. 57, and had (2) "played a prominent role in the public controversy." *Id.* at App. 63. However, in reaching this conclusion the Alabama Supreme Court ignored that several of this Court's controlling opinions, such as *Gertz* and others cited above, have recognized that the opportunity for self-help through media access is one of the defining characteristics of a limited purpose public figure. Instead, the court relied upon two obscure federal district court opinions, the more recent of which had relied upon the other as its supporting authority.[7]

The Alabama Supreme Court's opinion transgresses the First Amendment defamation framework because it fails to give sufficient weight to the effect of a gag order in controlling the status of a defamation plaintiff, particularly where the gag order was imposed by the defamation defendant. The NCAA gag order acted to create a set of facts involving Cottrell and Williams that, under the First Amendment framework this Court has established for defamation claims, required the Alabama Supreme Court to hold they were private figures *not* subject to the *New York Times* actual malice standard. The lower court's contrary ruling should be reversed.

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[7] The Alabama Supreme Court relied upon *Sculimbrene v. Reno*, 158 F. Supp. 2d 8 (D.D.C. 2001), and *Price v. Chaffinch*, 2006 WL 1313178 (D. Del. May 12, 2006). Both these federal district court cases are distinguishable and the unpublished opinion in *Price* should not have been used as supporting authority. In *Sculimbrene*, the defendant at issue with the court had not imposed the gag order on the plaintiff, as the NCAA defendants had done to Cottrell and Williams. In *Price*, unlike the coaches here who had secondary involvement in the NCAA investigation that focused on Alabama booster Logan Young rather than any of the coaching staff, the plaintiff actively sought to take a leading role in an ongoing public controversy. Moreover, to the extent that these opinions have any persuasive authority, Petitioners assert they are wrongly decided.

1. The Alabama Supreme Court applied an unconstitutional *Rosenbloom*-type analysis which focused on the scope of the public controversy, and not the extent to which the plaintiffs thrust themselves to its forefront

The Alabama Supreme Court acknowledged in its opinion that both Cottrell and Williams had no choice but to take part in the NCAA investigation of Alabama's football program once it began in late 1999, and that they were caught up in the public controversy that ensued "against [their] will." *Id.* at App. 51. However, even though the NCAA investigation in which Cottrell and Williams were participants did not begin until November 1999 and lasted until February 2002, the Alabama Supreme Court found that they had, merely by accepting assistant coaching positions in 1997 and 1994, "injected themselves into the [larger] public controversy" of Alabama's compliance with NCAA rules.[8] *Id.* at App. 57. The court stated:

> The public controversy surrounding [Alabama's] compliance with NCAA rules began in 1995. Thus, by accepting coaching positions, Cottrell and Williams "show[ed] a voluntary decision to place [themselves] in a situation where there was a likelihood of public controversy." Therefore, because Cottrell and Williams voluntarily accepted positions with [Alabama's] football program under such circumstances, we conclude they injected themselves into the public controversy.

Id. (footnote omitted).

The Alabama Supreme Court further concluded that when Cottrell and Williams accepted assistant coaching positions with Alabama's football program they knew that it

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[8] The Alabama Supreme Court noted that Alabama's football program had previously been investigated for certain NCAA rules violations in 1995, App. A at App. 7, and that in 1998 the NCAA investigated the basketball program for rules violations. *Id.* at App. 9-10.

was a high profile program and thus were limited purpose public figures because they assumed the risk of later being defamed. *Id.* This reasoning (which effectively creates a rule that all assistant football coaches for Division 1-A teams are public figures at all times) conflicts with this Court's opinion in *Wolston, supra,* where it was noted that "[a] private individual is *not* automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention." 443 U.S. at 167 (emphasis added). Like the plaintiff in *Wolston,* whom this Court held was *not* a limited purpose public figure, Cottrell and Williams were "dragged unwillingly into [a] controversy" when the NCAA "pursued [them] in its investigation." 433 U.S. at 166. Moreover, like the plaintiff in *Wolston,* because of the NCAA gag order, the coaches here "never discussed [the] matter with the press and limited [their] involvement to that necessary to defend [themselves] against the . . . charges." *Id.* at 167.

Additionally, the reasoning of the Alabama Supreme Court is troubling in that it shifts the focus of the question of Cottrell's and Williams's status from the facts relating to the controversy that existed at the time of the defamatory speech, back to the facts of a time years earlier. The lower court also based the coaches' legal status in large part on events with which they had no involvement.[9] The Alabama Supreme Court's analysis judicially creates a never-ending "controversy risk" for First Amendment purposes, based on the concept of a high-profile employer which *might* become embroiled in controversy from time to time, such that private figures hired to work for it at a time when no actual controversy exists nevertheless become public figures.

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[9] Williams began his position as an assistant football coach with Alabama in 1994, which was *before* the public controversy identified by the Alabama Supreme Court as beginning in 1995. Thus, as to Williams, the Alabama Supreme Court's ruling is plainly inconsistent with the facts it relies upon. Additionally, it should be noted that Cottrell's employment as an assistant coach with Alabama beginning in 1997 preceded the 1998 commencement of the NCAA investigation of the Alabama basketball program.

This overbroad standard for determining limited purpose public figure status would encompass an immeasurable number of persons, based merely on their having sought employment with a particular employer, rather than being based on the characteristics of the plaintiff himself or those of the specific controversy to which the defamatory speech against the plaintiff relates.[10]

This standard not only conflicts with this Court's precedent, it is also just as unconstitutional as that applied by the plurality in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 43-44 (1971), which held that the *New York Times* standard

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[10] The Alabama Supreme Court acknowledged that its ruling that Cottrell and Williams are limited purpose public figures was based on voluntary assumption of risk from their acceptance of assistant coaches positions with Alabama (a college football program that had previously been investigated by the NCAA), is inapposite to that of the Kentucky Supreme Court in *Warford v. Lexington Herald-Leader Co.*, 789 S.W.2d 758 (Ky. 1990), which held that under similar facts a college basketball assistant coach at the University of Pittsburgh was merely a private figure. App. A at App. 57-58, n.12. However, the court determined that the two cases were "easily distinguishable," based upon its conclusion that Pittsburgh's basketball program "received little recognition," while it asserted that Alabama's football program had national prominence. *Id.* at App. 58, n.12. The Alabama Supreme Court's attempt to distinguish *Warford* ignores this controlling standard of *Gertz* and substitutes an improper modified-*Rosenbloom* analysis that focuses on the relative size or import of the public controversy, concluding that Cottrell and Williams are limited purpose public figures because, in the court's opinion, the Alabama football program is more prominent than the Pittsburgh basketball program at issue in *Warford*. This reasoning is both contrary to this Court's precedent and not viable as a judicial standard. By what means is a court to judicially determine the level of prominence of a college athletic program? Is a newly-hired assistant football or basketball coach at Stanford University a limited purpose public figure based simply on his acceptance of the position? Does it depend on whether a judge in Sacramento, California is making that evaluation, or one across the country in Montgomery, Alabama? A state court's judge's own degree of pride in his alma mater or local college and belief that it is nationally prominent should not determine a defamation plaintiff's First Amendment status.

applied to a plaintiff whenever the defamatory speech involved "an issue of public or general concern," without regard to the plaintiff's "prior anonymity or notoriety." The Fourth Circuit Court of Appeals noted in *Wells v. Liddy,* 186 F.3d 505, 541 (4th Cir. 1999), that a court may easily fall prey to the simplistic test of *Rosenbloom* where everyone associated with a public controversy becomes some type of public figure, but recognized that such was simply not the law:

> There is a great *temptation* when evaluating a controversy as longstanding and significant as Watergate to allow the controversy itself to take precedence in the analysis and let it convert all individuals in its path into public figures. **The Supreme Court has admonished us strongly *against* allowing the public event with which the individual is connected to be the determinative factor governing an individual's public figure determination.**

(emphasis added). As the Fourth Circuit recognized, the *Rosenbloom* standard focusing on the existence of a public controversy and thus sweeping all varieties of plaintiffs into the same public figure category requiring the heavy burden of proving actual malice by the defendant, was *rejected* by this Court in *Gertz,* 418 U.S. at 343, *rejected* again in *Time-Inc. v. Firestone,* 424 U.S. 448, 456 (1976), and *rejected* yet again in *Wolston,* 443 U.S. at 167-68. In those opinions, this Honorable Court "eschew[ed] a subject-matter test for one focusing on the character of the defamation plaintiff." *Firestone,* 424 U.S. at 456.

The Alabama Supreme Court's decision below is unconstitutional because it did *not* apply the test for a limited purpose public figure set forth in this Court's controlling precedent. The court merely gave "lip service" to the required analysis of whether Cottrell and Williams "thrust themselves to the forefront of particular controversies in order to influence the resolution of the issues involved." *Gertz,* 418 U.S. at 345. This Court should grant this Petition and issue an

opinion which once again rejects the overly broad *Rosenbloom* approach, which improperly allowed the Alabama Supreme Court to give little or no weight to the effect of the NCAA gag order on Cottrell's and William's status as defamation plaintiffs.

2. The Alabama Supreme Court's factual conclusions were erroneous: plaintiffs did not interject themselves into a public controversy; nor did they play a prominent role

In addition to basing its opinion on an unconstitutional standard, the Alabama Supreme Court ignored many of its own factual conclusions in reaching its ruling that both Cottrell and Williams were limited purpose public figures. The court ignored its conclusions that Cottrell and Williams were (1) caught up in the controversy regarding the year 2000 NCAA investigation "against [their] will," App. A at App. 52, (2) that "the public controversy did not focus on the actions of the coaching staff," such as Cottrell and Williams, *id.* at App. 48, and (3) that "[t]he evidence does not support a conclusion that Cottrell and Williams tried to purposely influence the outcome of the public controversy." *Id.* at App. 50. These facts demonstrate that the NCAA gag order had an undeniable preclusive effect on Cottrell's and Williams's opportunity to engage in self-help defense of their reputations or otherwise attempt to influence the outcome of the public controversy. Under the controlling standard established in *Gertz* and other precedent of this Court, these factual conclusions should have dictated a ruling that the coaches were private figures.

3. The NCAA gag order rendered Cottrell and Williams private figures who could not protect their reputations when they were most vulnerable nor influence the public controversy

The Alabama Supreme Court violated this Court's First Amendment framework for defamation cases with regard to Cottrell's and Williams's claims based on the defendants' media leaks during the NCAA investigation, as well as the separate claims relating to the NCAA's subsequent internet web site publication of its "penalty summary" against Alabama. The court's error lies, as noted above, in its application of a *Rosenbloom*-type standard focusing on the existence of a public controversy instead of the proper standard established in *Gertz*. As noted above, the courts below acknowledged that NCAA Bylaw 32.1.4 acted as a gag order on Cottrell and Williams during the period of the investigation. The coaches complied with the NCAA gag order by not affirmatively seeking media attention to counteract the falsehoods stated about them and repeated to the public in newspaper stories or to influence the outcome of the controversy, *but also by even declining to respond when members of the news media made inquiries for their comments.*

This is evidenced by the following brief excerpts of some of the newspaper articles presented to the trial court, which note the existence and effect of the NCAA gag order:

- "Cottrell was not available for comment . . . " Tuscaloosa News, December 31, 2000.
- " 'I can't comment on anything because of the situation with the other stuff (NCAA investigation), but I never had that conversation,' Williams said." Tuscaloosa News, January 11, 2001.
- "Williams declined to comment about the call records, citing the NCAA investigation." Tuscaloosa News, February 22, 2001.
- "NCAA bylaws require that all UA officials involved in the investigation refrain from discussion

or comment that might impede the continuing investigation." Tuscaloosa News, February 23, 2001.

- "Cottrell, reached at his Tuscaloosa home, declined to comment, citing the ongoing NCAA investigation." Tuscaloosa News, June 1, 2001.
- "Williams, contacted by The Tuscaloosa News, declined comment." Tuscaloosa News, August 12, 2001.

App. E at App. 192.

The NCAA gag order had a devastating effect on Cottrell and Williams because it was in effect during the critical period of time when they were seeking employment after the entire Alabama coaching staff had been fired following the year 2000 three-win and eight-loss season.[11] The gag order prevented them from protecting their reputations when a negative perception of them by the public and their coaching peers was being formed due to the falsehoods the defendants leaked to the media. *Id.* at 191-95. For example, during deposition cross-examination by NCAA counsel, Cottrell expressed his deep frustration regarding his inability to defend his reputation when he most needed to do so.

> Q. So there is this whole bunch of rumors and what you believe to be false statements that were being circulated about you out in the media about this time, right?
>
> A. Yes.
>
> Q. And you felt those were very damaging to you and your reputation?

[11] After the 2000 football season, in which Alabama finished with only three wins and eight losses, the entire coaching staff was terminated from their positions. App. A at App. 14. Cottrell did not obtain employment as a football coach until 2005, and then it was only a position as the head coach of a high school team in rural Alabama at less than one-half his former salary. App. E at App. 143, 164-65. He is now out of coaching entirely. Williams did not obtain employment as a football coach until 2002. His position was as an assistant coach at a much smaller college in Georgia at less than one-half his former salary, *id.* at App. 143, 165-66. Williams has since been a coach at a high school in Alabama and is now an assistant coach at a junior college in Oklahoma earning even less than he did as a high school coach.

> A. **Yes, sir, and probably the most damaging thing was not really being able to respond during that time. Robert, it was probably the most frustrating for somebody – for media to ask and not being able to respond to allegations, things that were being said, that was very frustrating.**

Id. at App. 193-94 (emphasis added). The NCAA gag order left these assistant coaches completely powerless to affect public opinion about them during what was for them, the worst possible time. The effect of the gag order was to render them with even *less ability* to protect their reputations or influence the outcome of a public controversy than private figures, who at least are free to respond to questions and inquiries from the media.[12]

The NCAA and its co-defendants should not be allowed by this Court to have the benefit of Cottrell and Williams being categorized as limited purpose public figures in relation to the "media leak" defamation claims, when it was the NCAA itself who imposed the gag order and prevented the coaches from using media inquiries to engage in the self-help defense of their reputations. The ruling of the Alabama Supreme Court that reached such a distorted result improperly diminished the importance of the opportunity for effective self-help as a characteristic of limited purpose public figures, and ignored the fact that when deprived of such opportunity by the NCAA gag order, Cottrell and Williams were placed in an even *more vulnerable* position of needing the fullest protection of defamation law than are private figures.

The lower court also avoided addressing the important equitable question of whether a defamation defendant who imposed the gag order can be allowed to receive the benefit of the more strenuous *New York Times* actual malice standard for recovery of damages being placed on a plaintiff held to be a limited purpose public figure, where at the same time

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[12] An old saying of anonymous origin is worth noting here. "An unopposed lie, oft repeated, becomes accepted as the truth."

the plaintiff's ability to defend his reputation from the defamation was precluded by the defendant.[13] This gross inequity alone should be sufficient to preclude such a plaintiff from being held to be a limited purpose public figure, except for a showing of exceptional circumstances. This Court should reverse the Alabama Supreme Court and hold that Cottrell and Williams are private figures with regard to the defamation claims based on the "media leaks" that occurred while the NCAA gag order was in effect.

4. Cottrell and Williams were private figures as to their claims based on the defamatory statements in the NCAA's "Penalty Summary" published on its Internet web site

On the day in February 2002 that the NCAA released its Report on Infractions for the investigation of the Alabama football program, it also published a "penalty summary" on its internet web site that it has since admitted contained false and defamatory statements implying that Cottrell and Williams had been placed under a "show cause" order as punishment for rules violations. The Alabama Supreme Court held that Cottrell and Williams were limited purpose public figures in relation to the claims they brought based on the internet web site defamations, and thus had to show that the NCAA had acted with actual malice instead of merely negligence. App. A at App. 63-64. However, this Court should hold that the

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[13] This inequity in favor of the NCAA is amplified by the fact that during an investigation of a member institution and its athletic department coaches, the NCAA is not considered a state actor subject to the Fourteenth Amendment, so that it is not required to follow the established standards for due process, *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 199 (1988), and may easily misuse that power. For example, in this instance, the NCAA used a "secret witness," Tom Culpepper, whose identity was not publicly discovered – and thus his credibility publicly examined – until long after the NCAA completed its investigation and issued its Report on Infractions.

proper status of the coaches as to these claims is as private figures, just as it is for their claims regarding the earlier-occurring defamatory media leaks. Although the NCAA gag order that had prevented them from defending their reputations in response to the media leak defamations was lifted at the time of this later publication, their potential for media access was then limited and should not alter their status as private figures. Moreover, additional factors weigh in favor of private figure status as to these claims.

First, although the NCAA gag order was lifted, its damaging effect endured. While the coaches were finally able, some fourteen months after the NCAA investigation began, to proclaim publicly that they had been cleared of allegations of major rules violations, by that time their reputations had already been permanently injured by the combination of the defendants' defamatory media leaks and the coaches' inability to respond to them. As a result, the NCAA internet web site defamations were naturally all the more believable by those who read them. Thus, any attempt to engage in self-help defense of their reputations by the coaches and successfully cure the additional injuries would have been even more difficult.

Cottrell and Williams were also by that point in time approximately one and one-half years removed from their prior positions of assistant football coaches at Alabama, and had faded into the relative obscurity of completely private lives. *See* n.9, *supra*. Thus, in this later, post-NCAA gag order period, the coaches had none of the characteristics of limited purpose public figures. As acknowledged by the Alabama Supreme Court, they did not thrust themselves to the forefront of any public controversy. They did not have the same small degree of potential media access that they had had while assistant coaches at Alabama. They simply began what would be a futile search to find coaching positions similar to those they had held at Alabama, and then when that failed, to find any work at all to support their families.

Moreover, Cottrell and Williams did not actually engage in self-help to protect their reputations from the continuing defamatory falsehoods maintained on the NCAA's internet web site because, for a period of two years they were personally unaware of the defamation.[14] This may be perhaps this Court's first opportunity to consider the issue of defamation via an *internet posting*, as opposed to the heretofore more commonplace defamation spoken personally to the plaintiff's friends, neighbor's or co-worker's, or published in newspaper or magazine of widespread readership. In these instances of local publication, the plaintiff is most likely to learn of the defamation quickly and thus have the opportunity for self-help defense of his reputation, particularly if he has sufficient access to the media for effective counter-speech. However, while a defamatory falsehood posted on an internet web site may be more widely available, the person defamed may not promptly learn of it, making the factor of media access for self-help much less meaningful.

For these reasons, although these coaches gained the right to speak out publicly when the NCAA gag order was finally lifted, their correct status as private figures regarding their "media leak" defamation claims is not altered in relation to the subsequent NCAA internet web site defamations. This Court should reverse the ruling of the lower court and hold that Cottrell and Williams are private figures as to these defamation claims.

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[14] Even though the coaches were unaware of the defamatory statements on the NCAA web site, it is certain their reputations were further damaged because many persons did receive this additional defamatory publication. The NCAA's own information proves that that particular web page was accessed by the public 2,217 times over a three-month period, App. F at App. 331, even though the period was far removed from the initial publication of the penalty summary when it would have received its heaviest traffic. Thus, those persons most interested in the NCAA investigation of Alabama, who were likely to also have been aware of the media leak defamations, were the persons who received the NCAA's additional defamatory publication.

III. THE ALABAMA SUPREME COURT'S RULING THAT COTTRELL AND WILLIAMS COULD ONLY AVOID SUMMARY JUDGMENT THROUGH DIRECT EVIDENCE THAT THE DEFENDANTS LEAKED FALSE AND DEFAMATORY INFORMATION TO THE NEWS MEDIA VIOLATED THEIR DUE PROCESS RIGHTS

In its June 1, 2007 opinion, the Alabama Supreme Court held that Cottrell and Williams had supported their claim that the NCAA Defendants and Defendant Culpepper conspired to "leak" false and defamatory information about them to the news media with only "speculation and conjecture," and affirmed the summary judgment in favor of the Defendants. App. A at App. 81. The court took particular care to note the following:

> The news articles that Cottrell and Williams cite, however, referred to their sources as "sources close to the NCAA probe" and "sources close to the investigation." **None of the articles cited by Cottrell and Williams stated that "the information contained therein emanated from conversations with NCAA personnel."**

Id. (emphasis added). Thus, in holding that Cottrell's and William's indirect evidence was speculative, the court required the Plaintiffs to provide direct evidence that NCAA representatives had published false and defamatory statements about them to the news media, which were then repeated in news stories. However, any direct evidence from news reporters that the Plaintiffs could have possibly presented to the trial court was precluded by Ala. Code 1975, § 12-21-142, which, similarly to many other states,[15] provides an evidentiary privilege to news reporters barring discovery

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[15] By 1977, twenty-six states had enacted similar such "reporter's shield" statutes designed to protect the confidentiality of reporter's sources of information. Wright, C.A. and Graham, K.W., Jr., 23 Federal Practice and Procedure Evidence, § 5426 (2007).

of the identity of their sources for published information. Section 12-21-142 states:

> No person engaged in, connected with or employed on any newspaper, radio broadcasting station or television station, while engaged in a news-gathering capacity, shall be compelled to disclose in any legal proceeding or trial, before any court or before a grand jury of any court, before the presiding officer of any tribunal or his agent or agents or before any committee of the Legislature or elsewhere the sources of any information procured or obtained by him and published in the newspaper, broadcast by any broadcasting station, or televised by any television station on which he is engaged, connected with or employed.

App. D at App. 106-10.

The First Amendment privilege of reporters acknowledged by this Court in *Branzburg v. Hayes*, 408 U.S. 665 (1972), and other case law such as *Miller v. Transamerica Press, Inc.*, 621 F.2d 721 (5th Cir.), *modified on reh'g*, 628 F.2d 932 (5th Cir. 1980), is *not* an absolute privilege and will ultimately yield in a defamation case. In contrast, the Alabama statute provides newspaper reporters with an *absolute* shield from discovery of the identity of their confidential sources that will not yield. This statute, first enacted by the Alabama Legislature in 1935, *see* 1935 Ala. Acts 649, has been found to "cloth[e] the sources of a journalist's information with secrecy." *Ex parte Sparrow*, 14 F.R.D. 351, 353 (N.D. Ala. 1953). Given the complete discovery bar of § 12-21-142, Cottrell and Williams were unable to obtain the direct evidence the Alabama Supreme Court required in order to sufficiently support their "media leak" defamation claims.

However, Alabama law recognizes that a plaintiff in a civil lawsuit may meet his burden under Alabama Rules of Civil Procedure 56 and may prove his claim at trial with a preponderance of the evidence solely by virtue of indirect, or

"circumstantial," evidence.[16] Here, Cottrell and Williams met their burden of presenting substantial evidence in support of their claims through the use of indirect evidence[17] showing that the Defendants had the means, motive, and opportunity to "leak" false and defamatory information about the coaches to news reporters, including evidence which showed the following:

- that Defendants Johanningmeier and Yeager were the NCAA representatives in control of the investigation of Alabama's football program and thus were aware of its details, App. E at App. 133, 135-37, 140-42;
- that Johanningmeier had admitted to speaking to certain members of the news media regarding the investigation of Alabama, *id.* at App. 140, 197;
- that on the day the NCAA released its Report on Infractions about Alabama, it also issued a press release in which it made the unnecessary statement that one of the coaches was under a "*de facto* show cause order," evidencing bias against them, *id.* at App. 142;
- that Defendant Culpepper, who was involved in television and internet sport media, became a "secret witness'" for the NCAA's investigation at the behest of the NCAA and others, *id.* at App. 135-36, 181;
- that Johanningmeier provided confidential information about the investigation to Culpepper who

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[16] *Palm Harbor Homes v. Crawford*, 689 So. 2d 3, 9 (Ala. 1997); *Bell v. Colony Apts. Co.*, 568 So. 2d 805, 810-11 (Ala. 1990).

[17] The Alabama Supreme Court stated in its opinion that "Cottrell and Williams conceded in their depositions that they had no facts or evidence indicating that anyone at the NCAA leaked information to the press during the investigation." App. A at App. 81. However, the type of "facts or evidence" that was referred to in that instance was direct evidence, not indirect evidence. Neither Cottrell nor Williams ever conceded that they lacked indirect evidence of the NCAA's involvement in the defamatory "media leaks."

then shared it with members of the news media, *id.* at App. 197;

- that Culpepper hated Cottrell and wished to destroy him, that he had repeatedly spread defamatory rumors about both Cottrell and Williams to media members, and that he had a motive to harm them, *id.* at 137-40; and
- that the only other persons who could be considered "sources close to the investigation," were Law School professor Gene Marsh and Marie Robbins, representatives of the Alabama Athletic Department, who had no motive to make it appear to the public that either Cottrell or Williams had committed major violations of NCAA rules, and who actually had motivation to present Cottrell and Williams in a most favorable light, *id.* at App. 199-200.

In sum, the coaches presented evidence that the number of persons who would be considered "close" to the NCAA investigation was extremely small, and that among that small group the NCAA defendants and Culpepper were alone in having the motive to wish to defame and injure them.

Despite the abundant indirect evidence presented to the trial court by Cottrell and Williams that the defendants had conspired together to leak defamatory falsehoods about them to the news media, the Alabama Supreme Court focused on the coaches' failure to provide direct evidence in support of the claim. **In doing so, the lower court effectively *raised* the burden of proof in a manner which, when combined with the discovery bar of § 12-21-142, violated their right to due process of law protected by the Fourteenth Amendment.** While a simple error of state law is not a denial of due process, *Gryger v. Burke,* 334 U.S. 728 (1948), what is at issue here is not mere error by the Alabama Supreme Court, but an insurmountable conflict created by the court's requirement that the coaches prove their claims with evidence that the Alabama Legislature prohibited them from obtaining. It is that conflict that violates "elementary notions of fairness enshrined in our jurisprudence." *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 574 (1996). Here, the coaches were unfairly

burdened with the Alabama Supreme Court's expectation of direct evidence and the Alabama Legislature's bar to such evidence created by § 12-21-142.

Just as the Due Process Clause requires a certain burden of proof on different types of legal cases,[18] it must also require that a plaintiff in a civil case have a fair opportunity to meet that burden. This Court has stated that due process is violated if the State regulation of procedural burdens "offends some principle of justice so rooted in the traditions and conscience of our people so as to be ranked fundamental." *Patterson v. New York*, 432 U.S. 197, 201-02 (1977). The deeply rooted principle of justice at issue here is the right of a plaintiff to prove his claim by indirect, i.e., circumstantial evidence, which has long been recognized by this Court.[19] For example, in *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 713-14 (1983), this Court agreed with the Court of Appeals that the district court had erred in holding that a plaintiff alleging a claim of racial discrimination under Title VII of the Civil Rights Act of 1964 had to prove discriminatory intent by direct evidence. This Court found the ruling to be in error, and stated that "in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence." 460 U.S. at 714 n.3.

Here, Cottrell and Williams presented sufficient circumstantial evidence to prove their "media leak" defamation claims to the trier of fact, but the Alabama Supreme Court deemed direct evidence necessary. Thus, the coaches' fundamental right to prove their claims with circumstantial evidence, particularly

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[18] This Court had acknowledged that the Due Process Clause has been the basis for states establishing the standards of proof for different types of cases. *Addington v. Texas*, 441 U.S. 418, 423 (1979).

[19] *See Rea v. Missouri*, 84 U.S. 532, 543 (1873) (This Court noted that as to a claim of fraud, "[c]ircumstantial evidence is not only sufficient, but in most cases it is the only proof that can be adduced."); *Thompson v. Bowie*, 71 U.S. 463, 473 (1866) ("Circumstantial evidence is often as convincing to the mind as direct testimony, and often more so.") In the case below, just as *Rea* and *Thompson*, direct evidence of the misconduct was not available, due to the effect of § 12-21-142, and the only proof that could be adduced was the circumstantial evidence of the NCAA defendants and Culpepper's means, motive, and opportunity to commit the "media leak" defamations.

in light of the preclusive effect of § 12-21-142, was violated by the lower court. The violation of that right by the creation of a burden of proof the coaches could not meet because of the reporter's shield statute was a violation of their right to due process of law protected by the Fourteenth Amendment. This Honorable Court should grant this Petition and reverse the ruling of the lower court which had affirmed a summary judgment for the defendants.

CONCLUSION

This Petition for a Writ of Certiorari should be granted in order for this Court to answer the questions of first impression raised herein. The opinion of the Alabama Supreme Court reached an unconstitutional result in holding that Cottrell and Williams were limited purpose public figures that must have met the *New York Times* actual malice standard on the defamation claims at issue in this Petition, even though they were placed under a gag order by the NCAA during its investigation and thus could not influence the public controversy or use self-help to defend their reputations from defamatory falsehoods circulated by the defendants. Because of the gag order, the coaches could not even respond to reporter's questions, and thus had even less media access than a private figure. The lower court's *Rosenbloom*-type analysis that held the coaches to be limited purpose public figures because of their association with a prominent college football program violates this Court's First Amendment framework for defamation claims. Additionally, this Petition should be granted to review the issue of whether Cottrell's and Williams's due process rights were violated by the Alabama Supreme Court's requirement that they prove the defendants were the source of the "media leak" defamations by direct evidence, even though Alabama's "reporter's shield" law prevents discovery of such evidence.

Respectfully submitted,

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Appendix A

APPENDIX A – OPINION OF THE ALABAMA SUPREME COURT FILED JUNE 1, 2007

Notice: This opinion is subject to formal revision before publication in the advance sheets of ***Southern Reporter***. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in ***Southern Reporter***.

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2006-2007

1041858 and 1050436

Ronald W. Cottrell and Ivy Williams

v.

National Collegiate Athletic Association et al.

1050437

Tom Culpepper

v.

Ronald W. Cottrell.

Appeals from Tuscaloosa Circuit Court
(CV-03-810)

(Released June 1, 2007)

Appendix A

STUART, Justice.

Ronald W. ("Ronnie") Cottrell and Ivy Williams sued the National Collegiate Athletic Association ("the NCAA"), Tom Culpepper, and others alleging defamation, false-light invasion of privacy, negligence, wantonness, and civil conspiracy. The only claim that was presented to the jury was Cottrell's defamation claim against Culpepper. The jury returned a verdict for Cottrell in the amount of $6 million in compensatory damages and $24 million in punitive damages. Culpepper then filed a renewed motion for a judgment as a matter of law and a motion for a new trial. The trial court granted Culpepper's motion for a new trial. Cottrell and Williams appeal; Culpepper cross-appeals.

Facts

Cottrell and Williams are former assistant football coaches at The University of Alabama ("The University"). The University is a member of the NCAA, a nonprofit, unincorporated association whose members include "virtually all public and private universities and 4-year colleges conducting major athletic programs in the United States." *NCAA v. Tarkanian*, 488 U.S. 179, 183 (1988). The NCAA is governed by its member institutions, and one of its main goals is

> "'to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body, and by so doing, retain a clear line of demarcation between college athletics and professional sports.'"

488 U.S. at 183. The bylaws of the NCAA provide rules for the operation of a member institution's athletic programs, including recruitment and eligibility of prospective student-athletes and student-athletes, the salaries and the benefits of coaches and athletic staff, and the conduct and level of interaction between alumni and "athletic representatives" (better known as "boosters") of a member institution, on the one hand, and prospective student-athletes and enrolled student-athletes, on the other. As a member of the NCAA, the institution and its employees, student-athletes, alumni, and athletic representatives agree to comply with the NCAA rules and to submit to the NCAA's rule-enforcement process. If the NCAA investigates an alleged rule violation by a member institution, the member institution and its employees, student-athletes, alumni, and athletic representatives are required by NCAA rules to cooperate fully with the investigation into and the resolution of the alleged rule violation. Gene Marsh, the faculty athletic representative at The University from 1996 to 2003, explained the role of the institution and its representatives in the NCAA investigative process, stating: "[F]ull cooperation [with the NCAA rule-enforcement process] is not a strategy, but a duty if [an institution] chooses to remain a member of the NCAA."

The NCAA has two groups that are responsible for resolving an alleged rule violation committed by an institution. The enforcement staff[1] investigates the alleged rule violation, charges a member institution with a specific rule violation, and essentially prosecutes the case before

[1] The enforcement staff consists of full-time employees of the NCAA.

the committee on infractions ("COI").[2] The COI conducts a hearing to adjudicate the charge, and it imposes a penalty if it finds that a rule violation occurred.

When an alleged rule violation is reported to the NCAA, the enforcement staff investigates. Initially, the enforcement staff sends an investigator to the member institution to determine if the alleged rule violation can be substantiated. The investigator interviews the individual who has alleged the rule violation and any other persons who may have knowledge of the alleged rule violation. The investigator then reports his or her discoveries, which may support charges of additional rule violations by the member institution, to the enforcement staff, which determines whether the information adequately establishes that the member institution has violated a NCAA rule or rules. If the enforcement staff believes that the findings of the investigator support a charge of a rule violation or violations by the member institution, the enforcement staff sends a letter of preliminary inquiry to the member institution. This letter notifies the member institution that a preliminary investigation of alleged rule violation will be conducted. This phase of the rule-enforcement process involves extensive interviewing by the enforcement-staff investigator of employees of the institution, student-athletes, and any other individuals who may have knowledge of the alleged rule violation. If this inquiry indicates that the allegations may be meritorious, a letter of official

[2] The COI consists of individuals who are not "employees" of the NCAA, but who serve on a voluntary basis. Members of the COI include law professors, state or federal judges, attorneys, athletic directors, athletic-conference directors, and faculty athletic representatives.

inquiry ("LOI") issues to the member institution, detailing the facts surrounding the alleged rule violation and the specific rule or rules the enforcement staff believes the institution, its staff, alumni and/or athletic representatives have violated. A LOI may also be sent to various employees or athletic representatives of the institution who are alleged to have involvement in the rule violation. The institution and other recipients of a LOI file a response with the NCAA, explaining their positions on each alleged rule violation.

After the recipients of the LOIs have responded, the enforcement staff meets with them. This conference provides an opportunity for all parties to explain their positions on each violation. If the enforcement staff determines that a party's response adequately establishes that an alleged rule violation did not occur or that there is insufficient evidence to pursue the alleged rule violation, the enforcement staff can dismiss the charge. After the conference, the enforcement staff prepares a case summary, which sets forth the charged rule violation and the positions of the enforcement staff, the institution, and other recipients of LOIs with regard to each charged rule violation. The case summary is then submitted to the COI in preparation for the hearing. Essentially, this case summary details the alleged rule violation the enforcement staff charges against the member institution, its staff, and/or its athletic representatives.

The COI conducts a hearing at which all parties present their positions. Opening statements are made by each party. The enforcement staff then presents each charge and its evidence. The institution and any affected employee, staff member, or representative of the institution

then presents evidence as to why the charge lacks merit. Members of the COI ask questions of the parties involved at the hearing to develop the evidence. After each charge is fully addressed, each party presents a closing argument to the COI. The COI adjourns the hearing, deliberates, and returns with findings of fact with regard to each charged rule violation and a determination of the penalty to be imposed.

NCAA rules require that the investigation of alleged rule violations by the enforcement staff and the proceedings of the COI be conducted with confidentiality. The NCAA investigator, the member institution, and others involved in the investigation are required to maintain confidentiality throughout the entire process. Bylaw 32.1.4 of the NCAA Division I Manual, provides:

> "The cooperative principle imposes an affirmative obligation on each member institution to assist the NCAA enforcement staff in developing full information to determine whether a possible violation of NCAA legislation has occurred and the details thereof. *An important element of the cooperative principle requires that all individuals who are subject to NCAA rules protect the integrity of an investigation. A failure to do so may be a violation of the principles of ethical conduct.* The NCAA enforcement staff will usually share information with the institution during any investigation; however, it is understood the staff, to protect the integrity of the investigation, may not in all instances be able to share information with the institution."

(Emphasis added.)

Appendix A

When the COI issues its findings of fact and penalty determinations, it announces the decision via a press release and a published "Infractions Report." The press release and the report identify the member institution, but do not include the names of any staff members or athletic representatives who have been found to have violated a rule. The release and report may, however, refer to an individual by his or her position, such as "recruiting coordinator." The ruling of the COI may be appealed by any party to an appeals committee. The decision of the appeals committee is final.

The evidence submitted at trial indicated that The University had been investigated by the NCAA, charged with rule violations, and penalized on two prior occasions before 2000. In 1995, the NCAA had investigated allegations that a prospective student-athlete had received money in exchange for signing a scholarship to play football at The University and that after the student-athlete enrolled at The University he had received special treatment in securing a loan from a bank at which an athletic representative was an officer. The NCAA investigation did not substantiate the allegation that the prospective student-athlete had received money during his recruitment. The investigation did reveal that the enrolled student-athlete had secured loans to pay for disability insurance without making proper arrangements with The University.

During the 1995 investigation, the NCAA also focused on an allegation that The University had allowed a student-athlete to participate in football practices and games after he had signed a contract with a sports agent to represent him. NCAA rules provide that a student-athlete is ineligible

to participate in collegiate athletics if the student-athlete has indicated, by signing a contract with a sports agent, that he wants to pursue a career in professional sports. The contract between the student-athlete and the agent was written on a napkin and stated that the agent agreed to represent the student-athlete for $400. The investigation revealed that the student-athlete had informed The University that he had signed up to be drafted to play professional football but had removed his name from the list of potential draftees and had taken no additional steps toward a professional football career. The student-athlete, however, did not inform The University that he had signed a contract with an agent.

The NCAA concluded as a result of the 1995 investigation that The University had violated NCAA rules with regard to the student-athlete's securing the loan and by allowing a student-athlete who had entered into a contract with a sports agent to participate in football practices and to play in college football games. The NCAA found that The University's athletic department's compliance office, i.e., the office responsible for ensuring compliance with the NCAA rules, was not well organized and should have been more diligent in informing student-athletes about how to secure loans without violating NCAA rules. Additionally, the NCAA criticized The University for failing to conduct a more thorough in-house investigation of the circumstances surrounding the student-athlete's signing with an agent and for failing to self-enforce NCAA rules. The University recognized that it had violated NCAA rules, and it self-imposed penalties, including the disassociation of the two athletic representatives involved in the loans and a reduction in the number of potential scholarships in its football program by four for one year. The COI, however, increased

the penalties to include public reprimand and censure, a three-year probationary period, a one-year loss of participation in postseason competition by the football team, and the loss of an additional 22 scholarships for prospective student-athletes in football.

Newspaper and Internet articles admitted into evidence establish that the public was outraged by the harshness of the penalties and voiced its lack of understanding as to why the NCAA chose to impose such stiff penalties on The University. The discussion indicated that the public did not believe that the penalties issued against The University were equitable and fair, compared to penalties the NCAA had imposed on other member institutions for similar violations. Much of the discussion focused on the fact that The University recognized that it was not innocent of the violations, but that the punishment did not fit the offense, in light of The University's self-imposed penalty of disassociation of the boosters and loss of scholarships and The University's aggressive restructuring of its compliance department.

In 1998, The University was investigated after The University reported to the NCAA that it had violated certain rules when an assistant basketball coach contacted two athletic representatives and *attempted* to solicit money from them to pay high school coaches to "steer" their players to Alabama. When The University learned of the potential rule violations, The University initiated an internal investigation, a step The University had been criticized for not taking in the 1995 case; verified that violations had occurred; fired the coach, and, in compliance with NCAA procedures, which require an institution to notify the NCAA of rule violations, reported the violations

to the NCAA. The NCAA praised The University's compliance team, placed a show-cause order on the fired coach for four years, and extended The University's probationary period.

Once again, public discussion was generated about the NCAA's treatment of The University. The public was dismayed that, although The University did exactly what the NCAA and its rules required, complied with the rule-enforcement process by self-reporting the violation to the NCAA, and imposed an appropriate self-punishment, the COI extended the probationary period. The public voiced frustration that despite The University's compliance with the enforcement process, The University was not rewarded for its efforts. Public debate focused on whether The University should self-report rule violations and actively comply with the enforcement process when there appeared to be no benefit to The University in doing so.

In February 2000, the enforcement staff began investigating various alleged rule violations by The University's football program, its staff, and its athletic representatives. Initially, The University's football program was suspected of violating various rules with regard to the recruitment of prospective student-athlete Albert Means from Memphis, Tennessee, who in February 2000 had signed a scholarship to play football at The University. The evidence indicates that in 1999 the NCAA and the Southeastern Conference ("the SEC"), of which The University is also a member, had been notified that Means's high school coach was attempting to solicit money from coaches at various universities and colleges in exchange for granting the coaches the opportunity to recruit Means to play football at their

university or college. The evidence further indicates that although the NCAA and the SEC were aware that The University was recruiting Means, they did not notify The University or its compliance staff about the potential rule violations with regard to this solicitation of money. The investigation expanded to include other alleged rule violations with regard to recruiting that occurred in 1997 and rule violations involving enrolled student-athletes by athletic representatives and a coach.

During the course of the investigation, Phillip Fulmer, the head football coach for the University of Tennessee, informed Richard A. Johanningmeier, the enforcement-staff investigator assigned to The University's case, that he believed Tom Culpepper, an independent recruiting scout and sportswriter, had information about the role that Logan Young, an athletic representative of The University, had played in recruiting Means to sign a scholarship to play football for The University.

In August 2000, Johanningmeier telephoned Culpepper to request an interview. After Johanningmeier agreed that any information Culpepper provided during the interview would be confidential, Culpepper agreed to be interviewed. During the interview, Culpepper stated that in January 2000 he drove Young from The University's postseason football game in Miami, Florida, to Young's residence in Memphis, Tennessee. During the drive, Culpepper and Young discussed football recruiting at The University. According to Culpepper, Young stated that he was going to pay Means's coach and others to secure Means's commitment to sign a scholarship to play football for The University. During this interview, Culpepper also stated that Young informed him that he

had recruited Cottrell to be the recruiting coordinator for The University's football team, that Young had given Cottrell money to purchase his house in Tuscaloosa, that Cottrell had abandoned his wife and children in Tallahassee, Florida, that Young had paid one of Cottrell's gambling debts, and that Cottrell had arranged at least one fraudulent American College Test ("ACT") score for a prospective student-athlete. Lastly, Culpepper told Johanningmeier that although Young did not mention that Williams was involved in violations of NCAA rules, Culpepper believed that he was.

It also appears that during the period the NCAA was investigating these alleged rule violations and/or immediately thereafter, Culpepper made statements about Cottrell to "friends" who were members of the media. Culpepper told "friends" that Cottrell was a liar "without a job, and he's going to have a damn hard time finding one. And that's all there is to it," and that Cottrell had tried to ruin him, explaining "[Cottrell] slapped me, I slapped [him] back harder." He also made references to the coaches at The University as being "cheaters – recruiting cheaters" and to Williams as being a person who "funneled money" from Young to Means. These "friends" published the information Culpepper communicated about Cottrell and Williams in various media forums.

In October 2000, Cottrell became so concerned about the number and frequency of Culpepper's statements about him that he met with Culpepper in the presence of others in an attempt to resolve Culpepper's animosity toward him and to end Culpepper's verbal attack on his character and reputation. The evidence indicated, however, that Culpepper continued to make statements about

Cottrell and that, sometime after December 2000, he told Terry Harrington and Bruce Parrish, both members of the media, that Cottrell had abandoned his family in Tallahassee; that Cottrell and his assistant had stolen videotapes from The University's athletic department; and that Cottrell had stolen funds from the Shaun Alexander Foundation.[3]

In November 2000, Johanningmeier began conducting on-campus interviews at The University. Typically, during these interviews, in addition to Johanningmeier, Gene Marsh, Marie Robbins, the compliance director for The University's athletic department, and counsel for The University were present. Cottrell and Williams were both interviewed.

The evidence indicated that Cottrell was hired by The University's athletic department in 1997 as an assistant coach and recruiting coordinator for the football program. As part of his responsibilities as an assistant coach, Cottrell spoke to "Red Elephant Clubs" and individual chapters of The University's National Alumni Association and played in charity golf tournaments. Cottrell stated that he was frequently interviewed by sports writers and radio broadcasters about recruiting at The University. Indeed, Cottrell admitted that he was well known among the sports media and that he was regarded as a recruiting specialist. Additionally, the evidence established that before the 2000 NCAA investigation began, Cottrell had committed "minor" violations of NCAA rules and had been

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[3] Shaun Alexander was a running back at The University of Alabama. He currently plays professional football.

suspended from participating in recruitment for at least a month. In November 2000, following a season where the record was 3-8, Cottrell and the rest of the football coaching staff were fired. Nothing in the record indicates that Cottrell's firing was related to the violation of any NCAA rule.

The NCAA investigation established that although Cottrell had little involvement in recruiting Means, he did have a relationship with Young. The investigation also revealed information that Cottrell had violated several NCAA rules, including improperly accepting two loans from Young and improperly interacting with prospective student-athletes and enrolled student-athletes.

Johanningmeier also interviewed Williams, who was hired in 1994 as an assistant coach to coach running backs for The University's football team. In addition to coaching running backs, Williams, like other assistant coaches on The University's football staff, had recruiting duties. Williams was responsible for recruiting prospective student-athletes in the Memphis, Tennessee, area. Also, like Cottrell, Williams spoke to Red Elephant Clubs and individual chapters of The University's National Alumni Association, played in charity golf tournaments, and answered media questions, providing team and individual-player information.

Over 200 copies of articles published from 1994 to 2000 were submitted in evidence containing statements and comments made by Williams about various players, the team's preparation for games, the performance of football players during games, and the recruitment of prospective student-athletes. Like Cottrell, Williams was

fired in November 2000, and nothing in the record indicates a relationship between his termination and any NCAA rule violations.

When Johanningmeier interviewed Williams, he questioned Williams about recruiting in general and specifically about Means. He also questioned Williams about Williams's relationship with Young. The enforcement staff concluded from the investigation that Williams had had an inappropriate relationship with Young and had violated NCAA rules with regard to his recruitment of prospective student-athletes in the Memphis area and, in particular, Means.

Throughout the NCAA investigation that began in 2000, the media published detailed reports about the investigation on the radio and in the newspapers. The record contains copies of over 100 articles detailing information about the investigation and certain interviews.[4] Even though the investigation and the interviews conducted by Johanningmeier were supposed to be confidential, the evidence at trial established that the media were continually informed of the status of the investigation and the contents of some of the interviews. Indeed, testimony indicated that journalists often were aware of upcoming

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[4] The record also contains copies of articles about the federal prosecution of Young, who was convicted of bribing a public official – Means's high school football coach. This prosecution evolved from Young's involvement in recruiting Means to sign a scholarship to play football for The University and his alleged payment of over $100,000 to Means's coach to guarantee that Means would commit to The University. The articles indicate that one of the witnesses in that trial testified that Williams assisted Young in paying Means's coach to secure Means's commitment to play football at The University.

interviews and immediately following an interview would publish an article detailing the contents of the interview, including speculation about the impact the information revealed in the interview would have on the investigation. Cottrell and Williams testified that they were astounded by the specificity of the information reported by the media; neither Cottrell nor Williams, however, identified any specific source of the information they allege was "leaked" to the media.[5]

Johanningmeier reported the results of his investigation to the enforcement-staff team assigned to The University's case. The director then consulted with other enforcement-staff directors, and they determined, based on the information gleaned in the investigation, the specific charges to be made against The University, its staff, and its athletic representatives.

On February 2, 2001, the NCAA issued a preliminary LOI to The University. In September 2001, official LOIs were sent to The University, Cottrell, Williams, and others, listing various alleged rule violations and requesting a response to each alleged violation. The alleged rule violations occurred from 1997 through 2000 and included improper "offers and inducements" to prospective student-athletes and enrolled student-athletes by athletic representatives, "potential academic impropriety with student-athletes prior to their enrollment," and possible "unethical

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[5] However, in their third amended complaint, Cottrell and Williams alleged "that a newspaper article revealing information contained in [Cottrell's] first interview was published which, based on Marsh's own statements, had to come from him or someone connected to him."

conduct" by coaches who either knew of or participated in the rule violations.

The LOI to The University charged the institution with various rule violations. On November 17, 2001, the COI conducted a hearing on the alleged rule violations against The University. The University defended the allegations. On February 1, 2002, the COI issued its infractions report, finding that The University had committed numerous rule violations and imposed several penalties, including a ban from postseason game appearances for two years, the loss of 21 scholarships over a three-year period, and placement on a five-year probationary period. The penalties severely affected The University's ability to compete in football, the amount of revenue The University generated from football, and the amount of revenue The University received in its general scholarship fund from the football division of its athletic department.

Thomas Yeager, the chairman of the COI, during the teleconference announcing the penalties, stated that The University football program was "staring down the barrel of a gun" at a "death penalty" – a punishment that would terminate The University's football program. Classifying the violations as some of the worst that have ever been presented to the NCAA, Yeager stated that the determination of the penalty to impose for the violations was complicated by the fact that The University was a repeat offender and was on probation at the time of the misconduct.

In finding that The University had violated various NCAA rules, the COI focused mainly on the conduct of a "rogue" football athletic representative and some of "the

largest money amounts" alleged in any NCAA rule-violation case involving the recruitment of a prospective student-athlete. The infractions report stated:

> "While several serious allegations in this case involved the provision of extra-benefits to enrolled football student-athletes, at the heart of the case were football recruiting violations involving some of the largest money amounts alleged in any infractions case in the NCAA's history. . . .
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> " . . . Because of the university's repeat-violator history, including its experience with athletics representative misconduct, the number and seriousness of the violations, the visibility, prominence, and known predilections of the athletics representatives at the center of the violations, the committee seriously considered whether a finding of failure of institutional control might be warranted. *The violations charged and the evidence presented by the enforcement staff cited athletics representatives as primarily culpable for the violations, not members of the university's current or prior staffs.* The committee noted that it was limited by the scope and contours of the case as presented. Under the circumstances, the committee concluded that information in the case as presented was too tenuous and insufficient to form the basis of a lack of institutional control."

(Emphasis added.) Despite the COI's scathing public censure and the imposition of severe penalties, it complimented The University and the efforts of its compliance team to investigate the rule violations. Yeager stated in

the teleconference that he "did not see what else [The University] could have done" to prevent the violations by the athletic representatives.

Cottrell and Williams were the only two coaches on the coaching staff to receive LOIs. Williams's LOI charged that he had committed rule violations when he allegedly knew that Means's high school coach had requested money and a vehicle from Young to encourage Means to sign a scholarship to play football for The University and did not report the recruiting misconduct to The University, the SEC, or the NCAA; when he allegedly provided false and misleading information to Johanningmeier about the recruitment of Means; and when he allegedly exceeded the number of permitted visits to high schools in the Memphis area during the fall football-scouting evaluation period for 1999-2000. Before the COI hearing, the enforcement staff dismissed the charge against Williams with regard to the recruitment of Means and the charge that Williams failed to fully cooperate with Johanningmeier. Williams, however, admitted to exceeding the number of permitted visits to the Memphis area. The COI, recognizing the violation as one committed by The University, did not impose a penalty against Williams.

Cottrell's LOI alleged the following three major rule violations:

> 1. That Cottrell's receipt of two loans from Young for $1,600 and $55,000, respectively, violated the rule against unauthorized salary enhancements;

2. That Cottrell had engaged in unethical conduct by "knowingly providing misleading information regarding the loans" to Johanningmeier; and

3. That Cottrell had failed to report academic fraud in connection with a prospective student-athlete's ACT score.

Cottrell's LOI also charged three secondary rule violations:[6]

1. That Cottrell improperly allowed a prospective student-athlete to make long-distance telephone calls from his office;

2. That Cottrell improperly intervened with state police on behalf of a student-athlete to have a speeding ticket dismissed; and

3. That Cottrell had improperly made arrangements for an athletic department's staff member to drive a prospective student-athlete to Cottrell's home to rest after the student-athlete had received over-the-counter medications from The University's training room.

In his response to his LOI and/or during the prehearing conference between Cottrell and the enforcement staff, Cottrell admitted to receiving the loans from Young, denied knowingly misleading the enforcement staff about the loans, denied committing academic fraud with regard to a prospective student-athlete's ACT score, admitted that he had allowed a prospective student-athlete to make long-distance

[6] These secondary rule violations had been self-reported to the NCAA by the University

telephone calls from his office, admitted assisting a student-athlete with a speeding ticket, and admitted assisting a prospective student-athlete when he was ill. Cottrell also admitted that he had arranged two free football tickets for a high school guidance counselor and that he had sold four postseason football game tickets to a student-athlete. These two latter violations were not charged in Cottrell's LOI.

At the prehearing conference, the enforcement staff dismissed the charge against Cottrell alleging that he had committed academic fraud with regard to a prospective student-athlete's ACT score but decided to pursue the rest of the alleged violations against Cottrell. After the hearing, the COI found that Cottrell did accept an improper salary enhancement when he accepted the loans from Young and that he had failed to fully and completely disclose information during his interview with Johanningmeier. The COI did not impose a penalty against Cottrell for these violations. However, in its "news release," the NCAA stated:

> "[T]he committee considered imposing a show cause order on one of the former Alabama assistant coaches but decided not to do so because he was terminated by the university at the conclusion of the 2000 season and since that time has been out of college coaching, under what the committee considered to be a *de facto* show cause order."

The COI also found that Cottrell was not guilty of unethical conduct with regard to his failure to disclose the loans. The COI did not find the other alleged rule violations against Cottrell to be specific violations by Cottrell,

but did find that the violations occurred, and they were considered violations committed by The University. No individual penalties, however, were assessed against Cottrell for the violations.

Cottrell appealed the COI's finding that he failed to provide complete disclosure of the loans to Johanningmeier during his investigation. The appeals committee affirmed the COI's decision.

The COI's findings and a penalty-summary report with regard to The University's case were published on the NCAA's Web site on February 1, 2002. Even though the COI had not imposed any penalties against Cottrell, the published penalty-summary report stated that an eight-year show-cause restriction was imposed against the "recruiting coordinator." Additionally, the penalty-summary report indicated via a checkbox that a show-cause restriction had been placed on employees. These false statements were not corrected when the Web site penalty summary was updated to indicate that the COI's decision had been affirmed, and they remained on the NCAA Web site for nearly two years until Cottrell and Williams brought the false statements to the NCAA's attention.

The NCAA admitted that the information contained in the published penalty-summary report was false but maintained that its publication of the false information was a clerical mistake. It is without dispute that the statements were false because "The University of Alabama, Tuscaloosa Public Infractions Report" issued by the COI did not indicate that a show-cause provision had been

imposed upon the recruiting coordinator or that a show-cause provision had been placed on "employees."[7]

Testimony at trial established that Cheryl DeWees, the administrative assistant for the director of the committee on infractions, created the penalty-summary report from the COI infractions report in The University's case and entered it onto the NCAA's Web site on the same day she created and entered on the Web site the penalty-summary report for the University of Kentucky case. She stated that she inadvertently typed the false statement regarding the show-cause provision for the recruiting coordinator from the University of Kentucky report into The University's report. She also stated that this mistake

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[7] Indeed, when Cottrell and Williams made their second request that the Web site information be corrected, the NCAA made the correction and included the following explanation on its Web site:

> "The NCAA's web site contains a searchable database of major infraction reports and contains summaries of those reports. The penalty summary relating to the February 1, 2002, Public Infractions Report regarding The University of Alabama-Tuscaloosa, erroneously stated the recruiting coordinator had received an eight-year show cause requirement. This erroneous information was placed on the major infractions database through clerical error and has been corrected. The error appears to have been due to a sentence being transposed from the University of Kentucky's Public Infractions Report, whose recruiting coordinator did receive an eight-year show cause provision. The Alabama Public Infractions Report and the accompanying press release both correctly reflect that the former assistant coach did not receive a show cause requirement. The error was in the summary only. Although the former Alabama assistant coach also had the collateral responsibilities of recruiting coordinator, he was never identified as 'the recruiting coordinator' in either the Alabama Public Infractions Report or the press release. The NCAA regrets the error."

resulted in a default box being checked inadvertently, which indicated that a show-cause provision had been imposed against employees at The University.

Speculation about a pending NCAA investigation, the investigation of the alleged rule violations by The University, its staff, and its athletic representatives, and the findings of the COI and the penalties imposed received substantial media coverage. For example, the parties submitted over 100 published newspaper and/or Internet articles from across the State discussing the alleged rule violations by The University, particularly the facts surrounding Means's recruitment, the NCAA's investigation into the alleged rule violations, and the penalties imposed. The articles discussed not only facts surrounding the alleged violations, investigation, and penalties, but also the NCAA's past treatment of The University with regard to rule violations and its present treatment of The University throughout the process. In light of the NCAA's past criticism that The University did not adequately enforce institutional control or investigate alleged violations, many of the articles published before the infractions report issued specifically focused on whether the NCAA would consider as mitigation The University's self-reporting of numerous violations, its self-imposition of penalties, and its aggressive internal investigation of the alleged rule violations in an effort to show compliance with the rules and the NCAA enforcement process.

The severity of the penalties imposed in the 2000 case rekindled the public debate as to whether the NCAA treated The University unfairly. Discussion focused on the fact that the NCAA and the SEC knew of the Means recruiting situation, but did not warn The University.

Additionally, the public questioned the equity of the NCAA's treatment in light of the fact that The University was on probation for the self-reported 1998 NCAA rule violation and had received a harsh penalty in that case, despite the fact that The University had self-reported. Consequently, public debate focused on the propriety of the involvement of The University's compliance staff in the investigation, the benefit of self-reporting rule violations to the NCAA, and the NCAA's past and present treatment of The University.

Additionally, discussion focused on the NCAA's level of accountability with regard to the fairness of the investigative process and whether the penalties fit the violations. Specifically, the public debated the fairness of the NCAA's failure to inform The University of known information regarding potential recruiting-rule violations involving Means to allow The University an opportunity to prevent any improper conduct by its athletic representatives before it occurred. As in the 1998 debate, the public recognized that The University had violated NCAA rules, but it questioned the NCAA's treatment of The University in light of The University's proactive efforts to comply and to enforce the rules and the treatment of The University as compared to the treatment of other universities that had been found guilty of NCAA rule violations.

In late 2002, Cottrell and Williams sued the NCAA, Culpepper, and others, alleging against the NCAA and Culpepper claims of claims of defamation, civil conspiracy, false-light invasion of privacy, negligence, and wantonness.

These claims evolved from the NCAA investigation into The University's football program.[8]

With regard to the claim of defamation, Cottrell and Williams alleged that the NCAA and Culpepper published false statements that Cottrell and Williams were "involved in payoffs to a college football player and involved in various criminal activities." They further alleged that the NCAA made false statements to various media sources to the effect that Cottrell and Williams had been involved in illegal recruiting practices, such as giving football tickets to and paying prospective student-athletes. Additionally, Cottrell and Williams alleged that the NCAA published false statements on its Web site that a show-cause provision had been imposed against them.

With regard to the false-light invasion-of-privacy claim, Cottrell and Williams alleged that the NCAA, Culpepper, and others by their false statements placed them in a false light before the public. Specifically, they alleged that the NCAA placed them in a false light before the public by publishing on its Web site for over two years false statements that a show-cause provision had been imposed against them. The negligence and wantonness claims against the NCAA also addressed the publication of the statements on the Web site.

Lastly, Cottrell and Williams alleged that the NCAA, Culpepper, and others entered into a conspiracy to destroy

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[8] Cottrell and Williams sued other individuals and entities and pleaded numerous claims in their complaint and amended complaints. Only the claims mentioned and the defendants that are before us will be discussed in this opinion.

their coaching careers and personal reputations by making them the "scapegoats" in the investigation and sanctions. Specifically, they alleged that the NCAA, Culpepper, and others entered into a conspiracy that "caused and participated in actions to cause [false] statements [about them] to be published in the statewide news media and sent to various people in college football programs," which destroyed their reputations and ended their careers as college football coaches.

In May 2005, the NCAA and Culpepper moved for summary judgments. In their motions, they argued, among other things, that because Cottrell and Williams were limited-purpose public figures and they could not produce substantial evidence indicating that the NCAA or Culpepper had acted with actual malice in publishing the allegedly false statements, they were entitled to summary judgments. In June 2005, the trial court conducted a hearing on the summary-judgment motions and on July 7, 2005, the trial court entered an order stating:

> "The plaintiffs bring five (5) counts in their complaints. The claims are as follows:
>
> "1. Libel and slander [defamation claims].
>
> "2. Invasion of privacy.
>
> "3. Negligence.
>
> "4. Wantonness.
>
> "5. Civil conspiracy.
>
> "Prior to addressing the claims, however, there are some questions of law that must be addressed by the court.

"First, if the plaintiffs are public figures, the plaintiffs must prove actual malice by the defendants on the defamation claims. The parties are all in agreement as to the legal standard to be applied to determine if the plaintiffs are public figures. The dispute arises in applying the proffered facts to the law.

"As one court stated: 'Defining a public figure is like trying to nail a jelly fish to the wall.' (*Rosanova v. Playboy Enterprises Inc.*, 411 F.Supp. 440 [(D.C.Ga. 1976)]). A public figure can be a general-purpose public figure, or a limited purpose public figure. This court can say as a matter of law, without going into a lot of detail, that the plaintiffs do not satisfy the criteria of a general-purpose public figure. This would require the plaintiffs to have general fame or notoriety in the community, and pervasive involvement in ordering the affairs of society (*Gertz v. Welch*[, 418 U.S. 323,] 94 S.Ct. 2997 [(1974)]).

"A limited purpose public figure is determined by reference to the individual's participation in the particular controversy giving rise to the defamation (*Gertz,* infra). A person may become a limited purpose public figure in a matter of general public concern in one of four ways. By virtue of his position, by purposeful activity in thrusting [himself] into the public controversy, his close involvement with the resolution of matters of public concern, or by being drawn into the controversy. It is undisputed that the controversy regarding the charges against the University of Alabama was a matter of public concern.

"The court will then examine the four factors in reverse order. Since the Supreme Court decided

Gertz, it has never again mentioned the 'drawn into the controversy' factor again. This court has also not been able to find any other significant case whereby public figure status has been determined on that factor. Many legal experts feel that the Supreme Court has abandoned this factor (quote in *Dombey v. Phoenix Newspapers Inc.*[, 150 Ariz. 476,] 724 P.2d 562 [(1986)]). Since there exists no guidance or recent authority on this factor, this court is not going to bestow public figure status on the plaintiffs' based on the plaintiffs' being involuntarily drawn into the controversy.

"The third factor involves whether or not the plaintiffs have had a close involvement with the resolution of the controversy. The plaintiffs' names were mentioned early in the controversy, but they had little involvement with the resolution of the controversy other than giving their statements, and testifying at the infractions committee hearing.

"Factor two involves any purposeful activity in thrusting themselves into the controversy. The plaintiffs were under a gag order by the University of Alabama and the NCAA. They made no comments to the media, and quietly sat back during the NCAA investigation.

"The final factor involves looking at the individuals position with respect to matters of public concern, i.e., do the plaintiffs' positions give them regular access to the media on a regular and continuing basis. The defendants have presented evidence that from time to time the plaintiffs spoke to Red Elephant Clubs and quarterback clubs. Further, from time to time articles [were

written in which they are cited or quoted], and interviews were given by them. There is also evidence that the head coach at The University of Alabama retains the duty to have regular access to the media, and to comment on the team status in all areas, and all areas of publicity. The assistant coaches [do] not. From this point the evidence stops as to plaintiff Ivy Williams. The court finds that as to plaintiff Ivy Williams, the facts of this case are similar to the Kentucky Supreme Court case of *Warford v. Lexington Herald Leader*[,] 789 S.W. 2d 758 [(Ky. 1990)]. Under the facts of that case the assistant basketball coach was found not to be a public figure. Likewise, this court finds that plaintiff Ivy Williams's position was neither in such a position of public prominence that he was in a position to influence others, or the outcome of the controversy, nor did he enjoy regular and continuing access to the media.

"Plaintiff Ronnie Cottrell, on the other hand, was the recruiting coordinator at The University of Alabama. He was prominent enough that he was asked to have a charity golf tournament named after him. SEC Commissioner Roy Kramer stated in his deposition at page 256: 'I told him since he got a lot of publicity, which he did for the good recruiting job he did at Alabama, he would always be under the scrutiny of other coaches, and other schools. We talked about that was a burden you pay as a publicized recruiting coordinator at a high profile school such as The U of A.' . . . In Alabama, football recruiting is a matter of intense public concern, and invited public attention. The recruiting coordinator position at Alabama is a high profile position through

which the plaintiff Ronnie Cottrell could be expected to assume a role of public prominence, as pointed out by Commissioner Kramer. As such, plaintiff Cottrell would have access to the media, and a potential to influence the outcome of the controversy that a private person would not have. Based on the facts, and caselaw presented the court finds, as a matter of law, plaintiff Ronnie Cottrell was a limited purpose public figure.

" . . . The plaintiffs' defamation, false light, and conspiracy claims arise out of statements made during and after the investigative process.

"The third issue is whether or not the affirmative defense of the two (2) year statute of limitations defeats recovery for any of the plaintiffs' claims. The Alabama case of *Poff v. Hayes,* 763 So.2d 234 (Ala.2000), as cited by the defendants, stands for the proposition that in defamation cases, the two (2) year statute of limitations runs from the date of the publication. That date is the date the injury to reputation occurs. This lawsuit was filed on 12/20/02; therefore any defamatory statements made prior to 12/20/00 are barred by the two (2) year statute of limitations. Likewise, any other claims arising before 12/20/00 are time-barred.

"The fourth issue arises out of the defendants' affirmative defense of qualified privilege. The qualified privilege may apply where one acts in good faith in complying with a request for information from a third party (see *Clark v. America's First Credit Union,* 585 So.2d 1367 (Ala.1991)). It also applies if it is prompted by a duty owed either to the public or a third party, or

the communication is one in which the party has an interest and is made to another having a corresponding interest, if made in good faith, and without actual malice. The conditional, or qualified privilege would apply to the plaintiffs' claims arising out of the NCAA's letter of inquiry (LOI). It would also apply to the statements made by Tom Culpepper to defendant Richard Johanningmeier during the course of the investigation, and in the January and April 2001 conferences. The privilege can be overcome by proof that certain statements were not relevant to the investigation, were made in bad faith, or with actual malice. There is evidence before the court from which the jury could find that the privilege does not apply to some statements of defendant Tom Culpepper. There is no legally admissible evidence to overcome the privilege defense to the statements in the NCAA's LOI.

"These legal issues being decided, the court will now turn to the summary judgment motion. As a preliminary matter, this court was struck by the detailed time consuming, and thorough reconstruction of the NCAA investigation by the plaintiffs' attorneys. One cannot help but conclude that Dr. Marsh and Ms. Robbins are good and law-abiding individuals who strove to run a clean program. If the NCAA and SEC had made them privy to what Logan Young was doing, he would have been disassociated, Albert Means not signed, and the penalties against the University would have been less severe. There were two other major violations not involving the plaintiffs, which would have still resulted in severe sanctions against the U of A. However, after saying all this, The University of Alabama investigation is only

peripherally related to this case. The conspiracy that is relevant is a conspiracy by the defendants to defame the plaintiffs, and make them 'the fall guys.'

". . . .

"The court will next examine plaintiff Ivy Williams's claims against the remaining defendants. Plaintiff's claims are limited to events that took place on, or after 12/20/00. Considering the evidence most favorably to said plaintiff, there is substantial evidence supporting a defamation claim of libel and slander against defendant Tom Culpepper. There is also substantial evidence supporting plaintiff's defamation, and invasion of privacy (false light) claims against the NCAA as a result of the publication on the NCAA web site. The negligence and, wantonness claims are subsumed within plaintiff's defamation claims, because that culpability is an element of the defamation claims.

"There being no dispute of a material fact, and remaining defendants being entitled to judgment as a matter of law on all other claims, summary judgment is granted in favor of the remaining defendants on all other claims.

"As to the claims of plaintiff Ronnie Cottrell against the NCAA, there is insufficient legally admissible evidence to support this plaintiff's burden of proving by clear and convincing evidence, actual malice, to support any defamation claims. The plaintiff's negligence and wantonness claims must also fail, because these degrees of culpability will not support a cause of action arising out of defamatory acts against a public figure. The admissible facts do not support a

separate negligence or wantonness claim. Therefore, defendant NCAA being entitled to judgment, as a matter of law, on all plaintiff's claims against defendant NCAA, summary judgment is granted in favor of defendant NCAA, and against plaintiff Ronnie Cottrell.

"As to plaintiff Cottrell's claims against Thomas Culpepper, there is substantial evidence, if believed by a jury, supporting actual malice on said defendant's part, and defamatory statements which defendant Culpepper, either knew were false, or which were published with reckless indifference to their truth or falsity. As to the invasion of privacy claim, there was no substantial evidence, that the defendant made a publication to the public at large after 12/20/00. Further, there was no clear and convincing evidence of a conspiracy, to defame plaintiff Cottrell, specifically after 12/20/00 in support of a civil conspiracy claim. Further, there was no substantial legally admissible evidence that defendant Culpepper conspired with anyone to defame either plaintiff. Therefore, summary judgment is granted in favor of defendant Tom Culpepper, and against the plaintiff Ronald W. Cottrell on the civil conspiracy, and invasion of privacy claims. Summary judgment is denied as to the defamation and slander claim.

"As a footnote on the damage issue, there is a great deal of evidence that plaintiffs' damage, or injury to reputation was attributable to factors, other than the defendants' actions, such as:

Appendix A

> Milton Kirk's[9] revelations, statements by the U.S. Attorney in Memphis, media articles, comments, and rumors proliferated by sports talk shows, and internet web sites. The degree of damage attributable to the defendants will, however, be a question for the jury to determine from all the evidence."

On July 12, 2005, the trial began governed by the trial court's pretrial determination that Cottrell was a limited-purpose public figure and Williams was a private person. Cottrell presented evidence indicating that in October 2000 he had met with Culpepper in the presence of others to discuss Culpepper's attack on his reputation and character. The testimony indicated, however, that after December 2000, Culpepper had made statements to individuals, who subsequently published the statements, to the effect that Cottrell had abandoned his family in Tallahassee, Florida; that Cottrell had stolen funds from the Shaun Alexander Foundation; and that Cottrell and his assistant had stolen videotapes of prospective student-athletes from The University's athletic department. Cottrell presented evidence indicating that these statements by Culpepper were not true. Additionally, the evidence indicated that Culpepper made statements creating the inference that Williams was unethical in recruiting and that he had assisted Young in funneling money to Means. According to the testimony, Culpepper made these statements about Cottrell and Williams in an angry, belligerent, vindictive tone. With regard to Cottrell,

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[9] Kirk was an assistant high school football coach at the school Means attended in Memphis.

the evidence indicated that Culpepper had hostile feelings about Cottrell and wanted Cottrell out of college coaching.

The evidence tended to establish that Cottrell had suffered mental and emotional injury. Cottrell testified that he had been unable to obtain a job in college coaching and that he had been told that he needed to find a career outside college coaching. Cottrell, however, was not able to identify any potential employer who had relied on Culpepper's statements in refusing to offer Cottrell a college coaching job. He further explained that because he had been unable to obtain a job, he had been unable to provide financially for his family and had had to seek financial assistance from his parents, his brother, and his wife's mother. He testified that he has had to take prescribed medications to manage the stress and emotional upset. Cottrell's wife testified that Cottrell has trouble sleeping at night and that their personal finances and their marriage has suffered.

Williams testified that he had suffered mental and emotional injury. He too has been unable to find a steady job in college coaching. Williams stated that although he had had an offer to coach football at Miles College, the offer was rescinded when the Miles College athletic director learned of the NCAA investigation. Williams, however, admitted that he could not identify any potential employer who had relied upon the false statement in the NCAA penalty-summary report or the statements made by Culpepper as a reason not to hire him. Williams explained that he had suffered stress over financial issues and that he and his wife had had to sell their home and move into an apartment. The testimony indicated that as a consequence of what he considered to be an attack on Williams's

reputation, Williams became disheartened, depressed, and lifeless.

At the close of Cottrell and Williams's case-in-chief, the trial court reconsidered Williams's status as a private person and held that Williams was a limited-purpose public figure. Additionally, the trial court held that because none of the evidence established that any of the alleged defamatory statements were actionable per quod, i.e., that the statements resulted in special damages,[10] only the alleged defamatory statements that were actionable per se, i.e., that involved a crime of infamy or moral turpitude, would be submitted to the jury. The trial court then entered a judgment as a matter of law for the NCAA and for Culpepper on Williams's defamation claims. The trial court entered a judgment as a matter of law for the NCAA because Williams had not produced clear and convincing evidence that the NCAA acted with actual malice in publishing the defamatory statements on its Web site. With regard to Williams's defamation claim against Culpepper, the trial court found that the alleged defamatory statements were not actionable because Culpepper's statement that Williams funneled money to Means was not slander per se and Culpepper's other statement that Williams engaged in unethical recruiting was not actionable because it was a statement of opinion.

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[10] Evidence of special damages is evidence that the untrue statements resulted in a "'"material loss capable of being measured in money."'" *Butler v. Argo*, 871 So. 2d 1, 19 (Ala. 2003) (quoting *Shook v. St. Bede School*, 74 F. Supp. 2d 1172, 1180 (M.D. Ala. 1999), quoting in turn *Restatement (Second) of Torts* § 575 cmt. b. (1977)).

Culpepper, the sole remaining defendant, then presented his defense to the claims of Cottrell, the sole remaining plaintiff in the case. Culpepper's defense focused on whether Culpepper knew that the statements he made were false or whether he acted with reckless disregard as to whether they were true or not. He testified that the statements he made about Cottrell were based on information he had received from various present or former employees of The University's athletic department and that he had assumed that the statements were true. He admitted that he did not exercise good judgment when making the statements.

At the close of all the evidence, the trial court reconsidered Cottrell's status as a limited-purpose public figure with regard to the statements made by Culpepper to the effect that Cottrell had abandoned his family, had stolen funds from the Shaun Alexander Foundation, and had stolen videotapes from The University's athletic department. The trial court determined, based on all the evidence presented, that Cottrell was a private figure with regard to these statements. The trial court, therefore, instructed the jury that Cottrell had to prove by only a preponderance of the evidence that Culpepper negligently made the statements. The trial court did instruct the jury that to award punitive damages Cottrell had to establish that Culpepper made the statements with malice.

The jury returned a verdict in favor of Cottrell; Culpepper filed a motion for a new trial. Additionally, Cottrell filed a motion asking the trial court to address the applicability of an agreement between the NCAA and

Culpepper to a determination of Culpepper's ability to pay damages.[11] On November 15, 2005, the trial court issued an order granting Culpepper a new trial, holding that Culpepper was prejudiced when the court changed Cottrell's status from a limited-purpose public figure to a private person at the close of the evidence. Specifically, the trial court held that if it had determined earlier in the proceedings that Cottrell was a private figure, Culpepper would have defended the case differently. The trial court further held that Cottrell's request regarding the applicability of the agreement between the NCAA and Culpepper to Culpepper's ability to pay damages was moot in light of its ordering a new trial.

Cottrell and Williams appeal; Culpepper cross-appeals.

Standard of Review

This Court conducts a de novo review of rulings on a motion for a summary judgment and on a motion for a judgment as a matter of law. *Bailey v. Faulkner,* 940 So. 2d 247, 249 (Ala. 2006). In *Butler v. Town of Argo,* 871 So. 2d 1, 11-12 (Ala. 2003), we recognized:

> ""[T]his Court uses the same standard the trial court used initially in granting or denying a [judgment as a matter of law]. *Palm Harbor Homes, Inc. v. Crawford,* 689 So. 2d 3 (Ala. 1997). Regarding questions of fact, the ultimate question

[11] Culpepper and the NCAA entered into an agreement pursuant to which the NCAA agreed to pay Culpepper's expenses in litigation resulting from his being a confidential witness for the NCAA. (This statement is a general description of the agreement and is not a finding as a matter of law.)

> is whether the nonmovant has presented sufficient evidence to allow the case or the issue to be submitted to the jury for a factual resolution. *Carter v. Henderson,* 598 So. 2d 1350 (Ala. 1992). For actions filed after June 11, 1987, the nonmovant must present 'substantial evidence' in order to withstand a motion for a [judgment as a matter of law]. See § 12-21-12, Ala.Code 1975; *West v. Founders Life Assurance Co. of Florida,* 547 So. 2d 870, 871 (Ala. 1989). A reviewing court must determine whether the party who bears the burden of proof has produced substantial evidence creating a factual dispute requiring resolution by the jury. *Carter,* 598 So. 2d at 1353. In reviewing a ruling on a motion for a [judgment as a matter of law], this Court views the evidence in the light most favorable to the nonmovant and entertains such reasonable inferences as the jury would have been free to draw. *Motion Industries, Inc. v. Pate,* 678 So. 2d 724 (Ala. 1996). Regarding a question of law, however, this Court indulges no presumption of correctness as to the trial court's ruling. *Ricwil, Inc. v. S.L. Pappas & Co.,* 599 So. 2d 1126 (Ala. 1992).
>
> "'. . . .'
>
> "*I.C.U. Investigations, Inc. v. Jones,* 780 So.2d 685, 688 (Ala.2000)."

With regard to review of a trial court's ruling on a motion for a new trial, this Court has stated:

> "'It is well established that a ruling on a motion for a new trial rests within the sound discretion of the trial judge. The exercise of that discretion carries with it a presumption of correctness, which will not be disturbed by this

Court unless some legal right is abused and the record plainly and palpably shows the trial judge to be in error.'"

Curtis v. Faulkner Univ., 575 So. 2d 1064, 1066 (Ala. 1991) (quoting *Kane v. Edward J. Woerner & Sons, Inc.*, 543 So. 2d 693, 694 (Ala. 1989)).

Discussion

I. Whether the trial court erred in its determinations with regard to the defamation claims.

A. Cottrell's and Williams's classifications in the context of their defamation claims.

Because many of the allegations of error hinge upon the classification of Cottrell and Williams as either public or private figures, the Court will first address the classification of Cottrell and Williams in the context of their defamation claims.

1. General law regarding a claim of defamation.

A court must determine as a matter of law a plaintiff's classification in the context of a defamation claim. *White v. Mobile Press Register, Inc.*, 514 So. 2d 902 (Ala. 1987). This determination will establish the plaintiff's burden of proof. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). In defamation actions, a plaintiff is either a private person, a public official, or a public figure, either in general or for the limited purpose of a particular public controversy. *Mead Corp. v. Hicks*, 448 So. 2d 308 (Ala. 1984). If a plaintiff is determined to be a public official, public figure, or limited-purpose public figure, then the plaintiff has the burden of establishing by clear and

convincing evidence that the defamatory statement was made with " 'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times,* 376 U.S. at 280; *Curtis Publ'g Co. v. Butts,* 388 U.S. 130 (1967); *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974); and *White,* 514 So. 2d at 904. If it is determined that the plaintiff is a private figure, then the plaintiff has the burden of establishing by a preponderance of the evidence that the defendant negligently published the defamatory statement. *Mead Corp.*, 448 So. 2d at 312 (holding that "defendants who made false defamatory statements about private figures may be held liable if their conduct created an unreasonable risk of harm to the plaintiff"). Whether an individual is a public figure, limited-purpose public figure, or private figure is a question of law to be determined by the court. *Mobile Press Register, Inc. v. Faulkner,* 372 So. 2d 1282 (Ala. 1979). This determination must be made by the trial court before the jury is charged so that the court can properly instruct the jury. *Faulkner,* 372 So. 2d at 1285.

A public figure is one who either has gained notoriety from his achievements or seeks public attention through vigor and success. *New York Times,* supra. In *Gertz,* the United States Supreme Court reduced the "public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." 418 U.S. at 352. Thus, the Court recognized a limited-purpose public figure as "an individual [who] voluntarily injects himself or is drawn into a particular public controversy." 418 U.S. at 351.

In this case, the NCAA and Culpepper agree that neither Cottrell nor Williams is a public official or a general-purpose public figure. The NCAA and Culpepper, however, maintain that the evidence established that both Cottrell and Williams are limited-purpose public figures; Cottrell and Williams disagree, claiming that the evidence established that they are private figures. Therefore, we must determine whether the NCAA and Culpepper established that Cottrell and Williams were limited-purpose public figures.

2. The test for determining whether a plaintiff is a limited-purpose public figure and its application to the facts of this case.

In *Gertz,* the United States Supreme Court provided that it is the "nature and extent" of an individual's involvement in a public controversy, i.e., the extent to which the individual's participation is voluntary, the extent to which the individual has access to the media to counteract the false statements, and the prominence of the individual's role in the public controversy, that determines whether an individual is a limited-purpose public figure. 418 U.S. at 344-45. In *Little v. Breland,* 93 F.3d 755, 757 (11th Cir. 1996), the United States Court of Appeals for the Eleventh Circuit recognized that in *Silvester v. American Broadcasting Co.,* 839 F.2d 1491 (11th Cir. 1988), it adopted the three-pronged test from *Waldbaum v. Fairchild Publications, Inc.,* 627 F.2d 1287 (D.C. Cir. 1980), to determine whether a plaintiff in a defamation action is a limited-purpose public figure with regard to a public controversy. Under the test, a court determining whether a plaintiff is a limited-purpose public figure must "'(1)

isolate the public controversy, (2) examine the plaintiff's involvement in the controversy, and (3) determine whether the alleged defamation [was] germane to the plaintiff's participation in the controversy.'" In *Hutchinson v. Proxmire,* 443 U.S. 111 (1979), and *Wolston v. Reader's Digest Ass'n,* 443 U.S. 157 (1979), the United States Supreme Court unequivocally established that it is the plaintiff's role in the controversy, not the controversy itself, that determines whether a person is a limited-purpose public figure with regard to the alleged defamatory statements. The three-pronged test applied in *Little* provides a workable means of determining whether a plaintiff in a defamation action is a limited-purpose public figure because of his role in a public controversy; this Court adopts it and will now apply it to the facts of this case.

a. Isolation of the public controversy.

In *Waldbaum,* the United States Court of Appeals for the District of Columbia provided the following discussion on how to address the first prong of this test, stating:

> "As the first step in its inquiry, the court must isolate the public controversy. A public controversy is not simply a matter of interest to the public; it must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way. . . . [A] public controversy is a dispute that in fact has received public attention because its ramifications will be felt by persons who are not direct participants.
>
> "To determine whether a controversy indeed existed and, if so, to define its contours, the judge must examine whether persons actually were

> discussing some specific question. A general concern or interest will not suffice. [*Hutchinson v. Proxmire*, 443 U.S. 111 (1979)]. The court can see if the press was covering the debate, reporting what people were saying and uncovering facts and theories to help the public formulate some judgment. It should ask whether a reasonable person would have expected persons beyond the immediate participants in the dispute to feel the impact of its resolution. If the issue was being debated publicly and if it had foreseeable and substantial ramifications for nonparticipants, it was a public controversy."

627 F.2d 1296-98 (footnotes omitted).

Several factors lead to the conclusion that a public controversy existed before, during, and after the NCAA investigated the alleged rule violations by The University in 2000 and imposed the severe penalties against The University in 2002. In 2000, The University and the public learned about the NCAA's investigation into Young's involvement in recruiting Means and the federal charges that had developed. In light of The University's being on probation and in light of the efforts in 1998 by The University to comply with the enforcement rules and the NCAA's apparent disregard for that effort, a public debate developed about the 2000 investigation, including speculation on the propriety of the involvement of The University's compliance staff in the investigation, the benefit, if any, of The University's self-reporting NCAA rule violations, and the NCAA's treatment of The University. Additionally, discussion focused on the fairness of the investigation process itself and on the NCAA's accountability with regard to fitting the penalty imposed to the

offense. Consequently, widespread local and statewide media coverage was generated for over three years as the media sought to unravel precisely what had happened that resulted in The University's being charged and found guilty of several rule violations.

The public concern for The University and its football program was evidenced by the number of articles written and the detail of the information provided from the first allegations of a recruiting scandal in Memphis, the revelation of a "secret witness" assisting the NCAA in establishing the rule violations by The University, the statements made by Yeager that "The University of Alabama football program was staring down the barrel of a gun," the harshness of the penalties imposed, and the apparent inequity of the penalty in light of The University's efforts in compliance with the enforcement process.

Moreover, the citizens of Alabama had a legitimate interest in the controversy because The University is a public institution that receives State funds. The football program provides revenue for The University and, in light of the football program's tradition and history, is a source of pride for many of its graduates and the citizens of this State. Therefore, when "The University of Alabama football program was staring down the barrel of a gun" – facing potential termination of its football program – public discussion of all the circumstances creating the risk that the program could be terminated was rampant; a public controversy existed.

We reject Culpepper's argument that the public controversy included debate concerning the character, integrity, and fitness of Cottrell and Williams to coach and

work for The University. Culpepper relies on the reasoning of the United States District Court for the Northern District of California in *Barry v. Time, Inc.*, 584 F. Supp. 1110 (N.D. Cal. 1984), in defining the public controversy in that defamation case. In *Barry*, Barry, a former head coach for the basketball team at the University of San Francisco ("USF") sued one of his former basketball players, alleging that the player had defamed him when the player accused him of assisting an athletic representative of the basketball team in making improper cash payments to the player in violation of NCAA rules. In determining whether Barry was a limited-purpose public figure, the district court held that a public controversy existed involving "the alleged recruiting violations at USF before Barry's acceptance of the position of head basketball coach." 584 F.Supp. at 1116. The district court noted that USF had twice been the subject of NCAA investigations involving USF's basketball program, that one of those investigations had led to the resignation of one head basketball coach and the other had led to the firing of the head coach who had preceded Barry, and that USF had been trying to solve the problems of its basketball program for many years. Additionally, the court noted that the president of USF, when he appointed Barry as head coach, "insisted upon a 'clean' program." 584 F.Supp. at 1116. The court concluded that a public controversy existed because the reputation of USF was at stake and there was "a dispute as to what the University should *do* about allegations of recruiting violations." *Id.*

Culpepper argues that the public controversy surrounding the investigation into alleged NCAA rule violations by The University is analogous. He reasons that because The University, like USF, was a repeat offender, intense scrutiny and substantial discourse regarding the

rule violations developed. He further argues that because Cottrell and Williams were named in various articles as the coaches who were involved in the controversy, because they were closely associated with Young, and because they had been interviewed by the NCAA, a public debate developed about their character, integrity, and fitness. Culpepper, however, fails to recognize that although The University, like USF, was a repeat offender of NCAA rules, the public controversy did not focus on the actions of the coaching staff. Allegations of violations of NCAA rules by The University and by Cottrell and Williams did not lead to the resignation or firing of any of the football coaches. Indeed, none of the articles submitted impugned the character of Cottrell or Williams. Additionally, the articles did not suggest that the major violation of the NCAA rules was an ongoing problem involving football coaches or that The University had an "ongoing" problem that it had been trying to solve for years. Indeed, the evidence established that The University was making every effort to run a clean program and that, if the NCAA or the SEC had informed The University of the situation in Memphis, of which they were aware, actions would have been taken to prevent the egregious violation by the athletic representative who was the focus of the investigation. Unlike the public debate at USF, the public debate in this case did not question the reputation of The University or the integrity of its coaches; rather, the public debate concerned how the NCAA would view the efforts of The University to run a clean program and to engage in self-enforcement of NCAA rules. Therefore, evidence established that the focus of the public controversy surrounding The University was different from the public controversy involving USF. Based on the content, context, and forum of the controversy

surrounding The University as presented in the record, we refuse to conclude that the public controversy involved the character, integrity, and fitness of Cottrell and Williams to coach and to work for The University.

In conclusion, a public controversy existed; therefore, we must now focus on the roles of Cottrell and Williams in the controversy.

b. The plaintiff's involvement in the controversy.

Consideration of this prong involves the plaintiff's prominence in the public controversy, the plaintiff's access to channels of effective communication to counteract false statements, and whether the plaintiff voluntarily thrust himself or was drawn into the forefront of the public controversy. *Gertz,* 418 U.S. at 344-45. The court in *Waldbaum* stated:

> "Once the court has defined the controversy, it must analyze the plaintiff's role in it. Trivial or tangential participation is not enough. The language of *Gertz* is clear that plaintiffs must have 'thrust themselves to the forefront' of the controversies so as to become factors in their ultimate resolution. . . . They must have achieved a 'special prominence' in the debate. . . . The plaintiff either must have been purposely trying to influence the outcome or *could realistically have been expected, because of his position in the controversy, to have an impact on its resolution.* In undertaking this analysis, a court can look to the plaintiff's past conduct, the extent of the press coverage, and the public reaction to his conduct and statements."

627 F.2d at 1297 (footnotes omitted; emphasis added).

Appendix A

The evidence does not support a conclusion that Cottrell and Williams tried to purposely influence the outcome of the public controversy; therefore, we must determine whether Cottrell and Williams realistically could have been expected, because of their positions in the controversy, to have an impact on its resolution. Thus, this factor rests upon their prominence in the public controversy, their access to channels of communication, and the "voluntary" injection of themselves into the public controversy.

i. The prominence of the plaintiff in the public controversy.

This inquiry involves evaluating whether the plaintiff's actions have resulted in his being "embroiled" in the public controversy. See *Gertz*, 418 U.S. at 345 (holding that the limited-purpose public figures have "thrust themselves to the forefront of particular public controversies"). Perhaps the main question presented is would a reasonable person have expected Cottrell and Williams to play a significant role in determining the "outcome of the controversy." In this case, the "outcome of the controversy" relates to whether the NCAA would find that The University and its football program fully cooperated with the NCAA's investigation into the alleged rule violations and engaged in adequate self-policing and self-enforcement so as to avoid the "death penalty."

Cottrell and Williams argue that they did not play a prominent role in the controversy because, they say, the major focus of the investigation involved Young and his improper conduct in recruiting Means and did not focus on their alleged violations of NCAA rules. They assert that

because they were minor participants in the investigation, they should not be considered as having any influence on the outcome of the controversy.

The evidence, however, established that Cottrell and Williams did play a prominent role in the public controversy. Newspaper articles focused on their conduct, their interviews with Johanningmeier, the violations alleged against them, and how their conduct would impact the COI's view of The University. Both Cottrell and Williams were charged with not providing full disclosure of information during an interview. Although the enforcement staff dropped the charge against Williams, it pursued the charge against Cottrell. The COI found that Cottrell had not complied with the rules in this regard. Therefore, the conduct of Cottrell and Williams did influence the way the NCAA viewed The University's compliance with the rules.

Additionally, the record established that Cottrell and Williams both associated with Young, who was the major focus of the NCAA investigation and the main reason for the severity of the penalties imposed. Both Cottrell and Williams admitted violating certain NCAA rules, and, although no penalty was imposed against either Cottrell or Williams, The University was penalized for Cottrell's and Williams's violations of various NCAA rules.

Although the evidence indicated that Cottrell and Williams were "caught up in the controversy against [their] will," the evidence adequately established that they had assumed by their actions and their association with Young a "prominent position in its outcome." *Breland,* 93 F.3d at 758.

ii. The plaintiff's "access to channels of effective communication."

In determining a plaintiff's involvement in the controversy, consideration must also be given to the extent to which the plaintiff had access to channels of effective communication to counteract any false statements. *Gertz*, 418 U.S. at 344-45.

The NCAA and Culpepper argue that Cottrell and Williams had adequate access to the media to effectively rebut the alleged defamatory statements. The NCAA and Culpepper submitted over 200 newspaper and Internet articles published over several years containing comments by Cottrell and Williams throughout their careers at The University. Additionally, the NCAA points out that at the time it published the false statements in the penalty-summary report neither Cottrell nor Williams were prohibited from talking with the press.

Cottrell and Williams argue that although they did enjoy limited access to the press as assistant coaches who were questioned about various prospective student-athletes and enrolled student-athletes, the NCAA rules prohibited them from discussing the NCAA investigation with the press and prevented them from being able to defend their reputations in the press. They maintain that this "gag order" prevented them from having access to the media and precluded a finding as a matter of law that they were limited-purpose public figures.

In *Price v. Chaffinch*, (No. 04-956, May 12, 2006) (D. Del. 2006) (not reported in F.Supp.2d), the United States District Court addressed whether a "gag order" imposed by the defendant, which prevented the plaintiff from responding

in the media to the defamatory statements made by the defendant, precluded a finding that the plaintiff was a limited-purpose public figure. In *Price,* the plaintiff's media access was nonexistent, in light of the defendant's imposition of a "gag order." The federal district court held that although this fact "cut against" a finding that the plaintiff was a public figure, the plaintiff was aware that a public controversy existed, yet he voluntarily assumed a position in the controversy. The court balanced the gag order against the plaintiff's voluntary assumption of risk in the controversy and concluded that the plaintiff was a "significant player in a controversy with high public interest." Consequently, the court held that the "gag order" imposed on the plaintiff was a factor to consider, but did not preclude a finding that the plaintiff was a limited-purpose public figure.

A similar circumstance was also addressed in *Sculimbrene v. Reno,* 158 F. Supp. 2d 8 (D.D.C. 2001), in which a former FBI agent sued a media commentator, alleging that the commentator conspired with others to defame him. The commentator attacked the agent's credibility with regard to statements he had made to various congressional bodies. The agent was unable to respond in the media to the attack because the FBI refused to allow him access to the media. The court, when addressing whether the agent was a limited-purpose public figure who had been drawn into a public controversy, focused on the agent's role in the controversy. In conducting the analysis pursuant to the *Waldbaum* test, the court noted that the agent's "access to the press, both prior to the relevant controversy and during the relevant controversy, was at all times, circumscribed by his employment by the FBI," and his employer prevented him from talking with the media. 158 F.Supp.2d

at 23. Nevertheless, the court held that the agent was a limited-purpose public figure because his actions required the conclusion that the agent had played a significant role in the outcome of the controversy. Therefore, although the "gag order" prevented the agent from having access to the media, this fact did not outweigh the evidence indicating that the agent had played a prominent role in the controversy or preclude a finding that the agent was a limited-purpose public figure.

We agree with the federal district courts that the imposition of a "gag order" does not necessitate a finding that an individual is not a limited-purpose public figure. It deserves weight in making the determination, but it does not prevent such a finding.

Here, the "gag order" prevented Cottrell and Williams from discussing their role in the NCAA investigation with the press. However, the evidence that Cottrell and Williams played a prominent role in the public controversy significantly outweighs the effect of the "gag order."

iii. The conduct of the plaintiff either voluntarily injecting himself into a particular public controversy or being drawn into the public controversy.

(a) A plaintiff's voluntary injection into the public controversy.

"A private individual, however, is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention." *Wolston*, 443 U.S. at 167. "In general, to be a limited purpose public figure, the plaintiff must voluntarily thrust

himself into the vortex of the dispute. From the voluntary act is derived the notion of assumption of the risk and the consequent fairness in labelling the person a public figure." *Marcone v. Penthouse Int'l Magazine for Men,* 754 F.2d 1072, 1083 (3d Cir. 1985). In *Waldbaum,* the United States Court of Appeals for the District of Columbia elaborated on a plaintiff's voluntary injection into a particular public controversy, noting that a person becomes a limited-purpose public figure if he is attempts "to have, or realistically can be expected to have, a major impact on the resolution" of the public controversy. 627 F.2d at 1292. A person who voluntarily injects himself into a particular public controversy "invites" attention and comment. See *Hunter v. Hartman,* 545 N.W.2d 699 (Minn. Ct. App. 1996) (holding that a team doctor for a college football program was a limited-purpose public figure because he voluntarily commented in a book and on national television about the public controversy over a former head coach's coaching style); *Daubenmire v. Sommers,* 156 Ohio App. 3d 322, 805 N.E.2d 571 (2004) (holding that a coach voluntarily injected himself into a controversy by injecting religion into public schools); *Chevalier v. Animal Rehab. Ctr.,* 839 F. Supp. 1224 (N.D. Tex. 1993) (holding that a zoologist voluntarily injected himself into a controversy by appearing on television, giving interviews, and attempting to orchestrate a counter letter-writing campaign); *James v. Gannett Co.,* 40 N.Y.2d 415, 353 N.E.2d 834, 386 N.Y.S.2d 871 (1976) (holding that a belly dancer voluntarily injected herself into controversy by taking affirmative steps in the press to attract attention); and *Oaks v. City of Fairhope,* 515 F. Supp. 1004 (S.D. Ala. 1981) (holding that a librarian voluntarily injected herself into controversy by presenting her case in press).

Additionally, a person can voluntarily inject himself into a public controversy by choosing a position that thrusts the person into the public controversy. In *White v. Mobile Press Register, Inc.*, supra, this Court held that John C. White was a public figure because of "his choice of career as a high level executive in an industry that is the subject of much public interest and concern." 514 So. 2d at 904. The Court reasoned that his choice of career exhibited "a voluntary decision to place himself in a situation where there was a likelihood of public controversy." *Id.*

In *Fiacco v. Sigma Alpha Epsilon Fraternity,* [Ms. 1:05-CV-144, April 5, 2007] ___ F. Supp. 2d ___ (D.Me. 2007), the district court held that David Fiacco, the director of judicial affairs at the University of Maine, was a limited-purpose public figure. With regard to the "voluntariness" factor of the determination, the court held that Fiacco, in light of his position, voluntarily injected himself into the public controversy. The court determined that newspaper articles in the record established that a public controversy existed concerning the student-disciplinary process at the University of Maine. The court observed that as director of judicial affairs, "Fiacco had the capacity to investigate allegations of student misconduct, adjudicate cases, conduct hearings himself and proscribe sanctions or refer a case to a committee for its action." ___ F. Supp. 2d at ___. The court reasoned that "[t]he nature of the position thrust Fiacco into the public controversy surrounding the student disciplinary process." ___ F. Supp. 2d at ___. The court concluded that because Fiacco voluntarily accepted the position of director of judicial affairs and that position placed him at the center of a public controversy, he had injected himself into the public controversy.

We conclude that Cottrell and Williams also injected themselves into the public controversy. When Williams accepted his coaching position in 1994 and Cottrell accepted his position in 1997, both men knew that The University was a member of the NCAA, that they were expected to comply with NCAA rules in a highly competitive environment, and that their actions would come under close scrutiny. Cottrell and Williams were both responsible for recruiting prospective student-athletes to sign scholarships to play football for The University. Both coaches were expected to abide by NCAA rules when recruiting prospective student-athletes. The nature of their positions at The University and the responsibilities of their positions thrust them into the public controversy concerning The University's compliance with NCAA rules. Like White and Fiacco, Cottrell and Williams made career choices that thrust them into positions involving much public interest and concern. The public controversy surrounding The University's compliance with NCAA rules began in 1995. Thus, by accepting their coaching positions, Cottrell and Williams "show[ed] a voluntary decision to place [themselves] in a situation where there was a likelihood of public controversy." Therefore, because Cottrell and Williams voluntarily accepted positions with The University's football program under such circumstances, we conclude that they injected themselves into the public controversy.[12]

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[12] We recognize that the Kentucky Supreme Court in *Warford v. Lexington Herald-Leader Co.*, 789 S.W.2d 758 (Ky. 1990), held that Warford, a former assistant basketball coach for the University of Pittsburgh basketball program, did not "thrust himself into a public concern surrounding recruiting." 789 S.W. 2d at 770. The court's

(Continued on following page)

(b) Whether the plaintiff was drawn into public controversy.

A plaintiff is drawn into a public controversy when his actions invite comment and attention, despite the fact that the plaintiff does not actively try or even want to attract the public's attention. See, e.g., *Rosanova v. Playboy Enters., Inc.*, 411 F.Supp. 440 (S.D.Ga.1976), aff'd, 580 F.2d 859 (5th Cir. 1978)(holding that Rosanova was a limited-purpose public figure because he consistently associated with underworld contacts and voluntarily engaged in a course of activity that was bound to invite attention and comment). Therefore, a person can be drawn into a public controversy based on his status, position, or association to the public controversy. See *Swate v. Schiffers,* 975 S.W.2d 70 (Tex. App. 1998) (holding that a doctor was drawn into public controversy about the quality of his medical practice in light of the 24 articles written over 10 years describing the atrociousness of the doctor's medical practice).

The NCAA and Culpepper argue that Cottrell and Williams were drawn into the controversy because they played a role in the conduct that resulted in The University's being charged with various NCAA rule violations,

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holding rested in part on the fact that at the time Warford was hired, the University of Pittsburgh had an unexceptional basketball program and competed in a conference that received little recognition. Here, Cottrell and Williams were hired as coaches for a football program that had won 12 NCAA championships and is a member of a highly competitive conference whose members consistently compete for the national championship. Thus, the facts surrounding the nature of Warford's position at the University of Pittsburgh and the nature of Cottrell's and Williams's positions at The University are easily distinguishable.

they participated in the NCAA's investigation into those alleged rule violations, and they were the subject of numerous newspaper articles about the alleged rule violations. According to the NCAA and Culpepper, this evidence established that Cottrell and Williams were in positions that "invite[d] attention and comment" with respect to their participation in the controversy.

The evidence unequivocally established that by their actions Cottrell and Williams invited public scrutiny and should have expected public and media attention with regard to their conduct and involvement in the NCAA investigation of alleged rule violations and the surrounding public controversy. Articles detailed Cottrell's and Williams's conduct throughout the controversy, including their close association with Young, their interviews with Johanningmeier, the alleged rule violations made against them and their responses, and the penalties, or lack thereof, imposed against them. Additionally, the evidence established that Cottrell and Williams proactively engaged in the conduct that was the subject of alleged rule violations and admitted certain violations. Furthermore, their close association with Young, who was the central focus of the investigation, indicated that their conduct "invited public attention and comment." Without question, the evidence established that Cottrell and Williams engaged in a course of conduct with respect to the investigation and the surrounding controversy that was bound to invite attention and comment; therefore, Cottrell and Williams were drawn into the public controversy.

Indeed, it appears that there are similarities between Cottrell and Williams's being drawn into the public controversy by virtue of their alleged commission of violations

of various NCAA rules and a defendant who has been drawn into a public controversy by virtue of being accused of a crime. In *Wolston,* the United States Supreme Court held that a person who engages in criminal conduct does not automatically become a public figure. The Court noted that the status of the criminal defendant should be determined by focusing on the "'nature and extent of an individual's participation in the controversy giving rise to the [alleged] defamation.'" 443 U.S. at 167 (quoting *Gertz,* 418 U.S. at 352).

In *Ruebke v. Globe Communications Corp.,* 241 Kan. 595, 600-03, 738 P.2d 1246, 1251-53 (1987), the Kansas Supreme Court held that Ruebke, a criminal defendant, was a limited-purpose public figure because of the intense media coverage of the investigation into the triple murders Ruebke had been charged with; Ruebke's voluntary act of turning himself in to the police to seek protective custody; and his arrest and indictment for the three murders. The court held that although no one factor standing alone would be sufficient to convey limited-purpose public-figure status on Ruebke, the factors considered as a whole sufficiently established that Ruebke was drawn into a situation that invited comment. The court stated:

> "Individuals who do not seek publicity or consent to it, but through their own conduct or otherwise become a subject of public interest, may become limited public figures. Those who commit crime or are accused of it may wish to avoid publicity, but are nevertheless persons of public interest, concerning whom the public is entitled to be informed. *Restatement (Second) of Torts* § 652D, comment f (1976)."

241 Kan. at 600, 738 P.2d at 1251.

Although Cottrell's and Williams's conduct did not involve criminal activity, it did involve violations of NCAA rules, which impacted The University, its alumni, and the citizens of this State. Given the public nature of the conduct at issue here and the widespread media attention given the controversy, we hold that the evidence established that Cottrell and Williams were drawn into the public controversy.

c. Whether the alleged defamatory statements were germane to the plaintiff's participation in the controversy.

The NCAA and Culpepper contend that the alleged defamatory statements were germane to Cottrell's and Williams's participation in the public controversy. *Black's Law Dictionary* 708 (8th ed. 2004) defines "germane" as "relevant; pertinent."

i. The false statements made by the NCAA in the penalty-summary report posted on the NCAA Web site.

The statements made by the NCAA in the penalty-summary report involved the imposition of penalties for violations of NCAA rules by employees of The University. The statements indicated that a show-cause provision had been imposed against the recruiting coordinator and other employees of The University. These false statements were germane to the public controversy because a central issue of the public dispute was the nature of the penalties imposed by the NCAA against The University, its employees, and its representatives. As the NCAA stated, "the statements made by the NCAA during the infractions

process and in the erroneous penalty summary all were related to the NCAA investigation." Therefore, the NCAA's statements about Cottrell and Williams in the penalty-summary report published on the NCAA Web site were germane to the public controversy.

ii. The false statements made by Culpepper about Cottrell.

Cottrell contends that the statements made by Culpepper to the effect that Cottrell stole funds from the Shaun Alexander Foundation, that he and his assistant stole videotapes from The University's athletic department, and that he had abandoned his family in Tallahassee were not germane to the public controversy. In support of his contention, Cottrell emphasizes that these statements were not used by the NCAA or The University to substantiate any of the rule violations he allegedly committed. Cottrell reasons that because they were not relied upon in the investigation, the statements were not germane to the public controversy.

The record establishes that the statements made by Culpepper were not relevant to the public controversy. The public controversy did not focus on Cottrell's character or his fitness to coach, but on the investigative process and the NCAA's treatment of The University. Although one can argue that the public controversy implicitly involved Cottrell's character or his fitness to coach, the wealth of articles presented to this Court defining the public controversy do not lend themselves to such a conclusion. Therefore, we conclude that the statements made by Culpepper about Cottrell were not germane to the public controversy.

iii. The allegedly false statements made by Culpepper about Williams.

Culpepper made statements to the effect that Williams was a "recruiting cheater" and that he had funneled money from Young to Means. These statements described rule violations the NCAA was investigating and, therefore, were germane to the public controversy.

iv. The allegedly false statements made by the NCAA and Culpepper in furtherance of their conspiracy to leak information to the media and to ruin Cottrell's and Williams's reputations.

Like the statements made by the NCAA in the penalty-summary report, these statements were germane to the public controversy because they were allegedly made during the NCAA investigation and involved information about various interviews and evidence relied upon by the NCAA in developing its charges of rule violations against The University and against Cottrell and Williams. Indeed, Cottrell and Williams do not refute the argument that these alleged defamatory statements were germane to the public controversy.

3. Conclusion

Because the evidence established that a public controversy existed, that Cottrell and Williams played a prominent role in the public controversy, and that the statements made by the NCAA in the penalty-summary report were germane to the public controversy, Cottrell and Williams were limited-purpose public figures with

regard to the statements made by the NCAA in the penalty-summary report. Cottrell and Williams were also limited-purpose public figures with regard to the conspiracy claim against the NCAA and Culpepper alleging media leaks. With regard to the statements made by Culpepper about Williams, the evidence established that Williams was a limited-purpose public figure. Finally, the evidence established that Cottrell was a private person with regard to the statements made by Culpepper that Cottrell had abandoned his family and had stolen funds from the Shaun Alexander Foundation and videotapes from The University's athletic department.

The trial court did not err in its rulings concerning the classifications of Cottrell and Williams in their defamation claims.

B. Determination as a matter of law as to whether the defamatory statements involved a matter of public concern.

Culpepper contends that the trial court erred in denying his motion for a judgment as a matter of law because, he says, his statements about Cottrell involved matters of public concern and Cottrell did not present clear and convincing evidence of actual malice to establish a prima facie case of defamation.

"[W]here it is determined that a private individual is alleging defamation, there must be a determination of whether the defamatory speech involves a matter of public concern." *Ex parte Rudder*, 507 So. 2d 411, 416 (Ala. 1987). If the matter is of public concern, then the defamed private individual must prove by clear and convincing evidence that

the statements were made with actual malice, that is, "with knowledge that [the statements were] false or with reckless disregard of whether [they] were false or not." *Nelson v. Lapeyrouse Grain Corp.*, 534 So. 2d 1085, 1095 (Ala. 1988).

The jury held that the following statements by Culpepper about Cottrell were defamatory:

> 1. That Cottrell stole funds from the Shaun Alexander Foundation;
>
> 2. That Cottrell and his assistant stole video tapes from The University's athletic department; and
>
> 3. That Cottrell had abandoned his family in Tallahassee.

With regard to Culpepper's statement that Cottrell stole funds from the Shaun Alexander Foundation, we conclude that this statement does not involve a matter of public concern. In *Nelson*, 534 So. 2d at 1096, this Court held that a theft by an employee from a private company was not a matter of public concern. Similarly, we conclude that a theft by an individual from a foundation is not a matter of public concern. Theft of property from a private company or foundation does not involve a threat to public safety, a theft of public funds, or an abuse of public trust; therefore, statements made about thefts from private entities are not matters of public concern. Cf. *Ex parte Rudder* (holding abusive prescription-drug practices involved matter of public concern); *Silvester* (holding jai alai industry a matter of public concern); *Rosanova* (holding organized crime matter of public concern). Thus, because Culpepper's statement that Cottrell stole funds

from the Shaun Alexander Foundation did not involve a threat to public safety or a misuse of public property or trust, the trial court did not err in denying Culpepper's motion for a judgment as a matter of law with regard to that statement.[13]

Likewise, the trial court did not err in denying Culpepper's motion for a judgment as a matter of law with regard to Culpepper's contention that his statement that Cottrell had abandoned his family involved a matter of public concern. This general statement does not suggest a threat to public safety, public funding, or public trust; therefore, the statement does not involve a matter of public concern.[14]

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[13] This holding is limited to the facts and evidence in the record before us. We can envision instances when a party could establish that a theft from a charitable organization constitutes a matter of public concern. However, this record does not contain any information about the Shaun Alexander Foundation, its organizational classification, its purpose, or its funding. Additionally, the record does not contain information regarding the source of the funds that were allegedly stolen. Because the record does not support a finding that the alleged theft from the Shaun Alexander Foundation involved a theft of money donated by the public or involved an abuse of public trust, we cannot conclude that the statement regarding the theft in this case involves a matter of public concern.

[14] We find the statement that Cottrell had abandoned his family to be distinguishable from the defamatory statements at issue in *Forrester v. WVTM TV, Inc.*, 709 So. 2d 23 (Ala. Civ. App. 1997), a libel action against a television station, in which the Alabama Court of Civil Appeals held that disciplining a child in a public place is a matter of public concern. Here, we have a general statement that Cottrell abandoned his family with no further information. Such a general statement without more specificity and factual support does not support a conclusion that the statement involves a matter of public concern.

Finally, the trial court did not err in denying Culpepper's motion for a judgment as a matter of law with regard to his statement that Cottrell stole videotapes from The University's athletic department. Culpepper argues that the trial court erred in holding that his statement that Cottrell stole videotapes from The University's athletic department did not involve a matter of public concern. We agree. Cottrell was an employee of The University's athletic department. The videotapes were the property of The University's athletic department. The athletic department is a department within The University. The University is a public institution, governed by a board of trustees appointed by the Governor of Alabama and approved by the legislature, and funded by the citizens of Alabama. Because this statement involved a theft from a public institution by an employee of the institution, this statement involved a matter of public concern. Thus, the trial court erred in holding that the statement was not a matter of public concern.

Because Culpepper's statement that Cottrell stole videotapes from The University's athletic department involved a matter of public concern, Cottrell must present clear and convincing evidence of actual malice to satisfy his burden of proof for his defamation claim based on that statement to be submitted to the jury. Culpepper contends that the trial court erred in denying his motion for a judgment as a matter of law because, he says, Cottrell did not present clear and convincing evidence of actual malice with regard to this statement. According to Culpepper, Cottrell's evidence did not establish that he made the statement with "reckless disregard" as to whether the statement was false or not. The evidence, however, established that in October 2000, Cottrell, in the presence of

others, met with Culpepper and asked him to stop making statements that impacted his reputation. Culpepper made the statement at issue after December 2000. Viewed in a light most favorable to Cottrell, the evidence created a jury question as to Culpepper's state of mind when he made the false statements. Therefore, the trial court did not err in denying Culpepper's motion for a judgment as a matter of law in this regard.

C. Determination as a matter of law as to whether Culpepper's statement that Cottrell had abandoned his family is actionable.

Culpepper contends that the trial court erred in denying his motion for a judgment as a matter of law because, he says, his statement that Cottrell had abandoned his family in Tallahassee is not slander per se.

> "[I]t is clear from our decisions that in a slander action, to constitute slander actionable per se, the alleged slander must impute an indictable offense involving infamy or moral turpitude. *Marion v. Davis,* 217 Ala. 16, 114 So. 357, 55 A.L.R. 171 (1927), quoted with approval in *Tonsmeire v. Tonsmeire,* 281 Ala. 102, 199 So. 2d 645 (1967). We do not think the alleged slander here is actionable per se. We do not believe that being 'fired and rehired' imputes an indictable offense involving infamy or moral turpitude; nor does 'committing assault and battery' (assuming it is a part of the defamation charged). *Dudley v. Horn,* 21 Ala. 379 [(1852)]; *Gillman v. State,* 165 Ala. 135, 136, 51 So. 722 [(1910)]. 'Infamy' is defined by *Black's Law Dictionary,* Fourth Edition, as:
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> > " 'INFAMY. A qualification of a man's legal *status* produced by his conviction of

> an infamous crime and the consequent loss of honor and credit, which, at common law, rendered him incompetent as a witness, and by statute in some jurisdictions entails other disabilities. *State v. Clark,* 60 Kan. 450, 56 P. 767.'

"'Moral turpitude signifies an inherent quality of baseness, vileness, depravity.' *Gillman v. State,* supra.

"However, as the court pointed out in *Marion v. Davis,* supra, viz:

> "'This distinction, however, does not deny the right to maintain an action for slander founded on oral malicious defamation subjecting the plaintiff to disgrace, ridicule, odium, or contempt, though it falls short of imputing the commission of such crime or misdemeanor. In such case the law pronounces the words actionable per quod only, and *the plaintiff must allege and prove special damages as an element of the cause of action.*' . . . [Emphasis supplied]

"'Per quod' is defined in Black's Law Dictionary, Fourth Ed., at p. 1293:

> "'PER QUOD. Lat. Whereby. When the declaration in an action of tort, after stating the acts complained of, goes on to allege the consequences of those acts as a ground of special damage to the plaintiff, the recital of such consequences is prefaced by these words, "per quod," whereby; and sometimes

> the phrase is used as the name of that clause of the declaration.
>
> "'Words "actionable per quod" are those not actionable per se upon their face, but are only actionable in consequence of extrinsic facts showing circumstances under which they were said or the damages resulting to slandered party therefrom. *Smith v. Mustain,* 210 Ky. 445, 276 S.W. 154, 155, 44 A.L.R. 386.'
>
> "It seems clear that since no allegation of special damages is made in the complaint, the demurrers were properly sustained by the trial court."

Brown v. W.R.M.A. Broad. Co., 286 Ala. 186, 188, 238 So. 2d 540, 541-42 (1970) (footnote omitted). A decision whether a statement is reasonably capable of a defamatory meaning is a question of law. *Harris v. School Annual Publ'g Co.,* 466 So. 2d 963. 964 (Ala. 1985).

At the close of the evidence, the trial court held that Culpepper did not establish special damages; therefore, the statements were not actionable as slander per quod. Cottrell does not contest this ruling; therefore we will not review it. Thus, for Culpepper's statement that Cottrell had abandoned his family to be actionable, he must establish that the statement is slander per se, i.e., the statement imputed an indictable offense involving infamy or moral turpitude.

> "When determining whether a statement is actionable as slander per se, a court must give the language used 'that meaning that would be

> ascribed to the language by a reader or listener of "average or ordinary intelligence, or by a common mind."' *Camp v. Yeager,* 601 So. 2d 924, 927 (Ala. 1992), quoting *Loveless v. Graddick,* 295 Ala. 142, 148, 325 So. 2d 137, 142 (1975). . . . [T]he alleged slanderous statement must be construed in connection with the other parts of the conversation, in order to determine the context in which the statement was made."

Liberty Nat'l Life Ins. Co. v. Daugherty, 840 So. 2d 152, 157-58 (Ala. 2002).

Cottrell contends that Culpepper's statement that he abandoned his family described a violation of § 13A-13-5, Ala.Code 1975, which states, in pertinent part:

> "A man or woman commits the crime of abandonment of a child when, being a parent, guardian or other person legally charged with the care or custody of a child less than 18 years old, he or she deserts such child in a place with intent wholly to abandon it."

Cottrell contends the statement also describes a violation of § 13A-13-4, Ala.Code 1975, which provides, in part:

> "A man or woman commits the crime of nonsupport if he or she intentionally fails to provide support which that person is able to provide and which that person knows he or she is legally obligated to provide to a dependent spouse or child less than 19 years of age."

We, however, cannot conclude that the statement that Cottrell had abandoned his family imputed the above indictable offenses.

Appendix A

In *Blevins v. W.F. Barnes Corp.*, 768 So. 2d 386 (Ala. Civ. App. 1999), the Alabama Court of Civil Appeals held that a statement that the plaintiff "tried to extort money out of me because I refused to pay his demands" was not slander per se. The Court of Civil Appeals reasoned that because the word "extort" had at least two meanings, the statement at issue was not slander per se.

Like the word "extort," the word "abandon" is not limited in meaning to that defined by the criminal statutes. "Abandon" is defined as:

> "1a: to give up to the control or influence of another person or agent b: to give up with the intent of never again claiming a right or interest in . . . 2: to withdraw from often in the face of danger or encroachment . . . 3: to withdraw protection, support, or help from . . . 4: to give (oneself) over unrestrainedly 5a: to cease from maintaining; practicing, or using . . . b: to cease intending or attempting to perform."

Merriam-Webster's Collegiate Dictionary 1-2 (11th ed. 2003). The term "abandon" has too many meanings to necessarily suggest the indictable criminal offenses. Additionally, the record does not contain portions of Culpepper's conversation discussing Cottrell's alleged abandonment of his family to establish the context of the statement. Because the word "abandon" has more than one meaning and because we have no facts to establish the context in which the statement was made, we cannot conclude that Culpepper's statement that Cottrell had abandoned his family charged an indictable offense. Therefore, the statement is not slander per se.

Because the statement is not slander per quod and because Cottrell did not establish that the statement that he had abandoned his family was slander per se, the trial court erred in denying Culpepper a judgment as a matter of law on this claim of defamation.

D. Williams's claim of defamation against Culpepper.

Williams appears to inartfully challenge the trial court's rulings with regard to Culpepper's statements about him. Culpepper contends that the trial court properly entered a judgment as a matter of law for him with regard to Williams's claims of defamation because, he says, the trial court properly concluded that the statements were not actionable.

The trial court held that the evidence did not establish that Culpepper's statements were slander per quod and Williams does not challenge this holding. Therefore, Williams had to establish that Culpepper's statement were slander per se. Neither the statement that Williams was a "recruiting cheater" nor the statement that he funneled money from Young to Means imputed a crime of infamy or moral turpitude. Therefore, these statements were not slander per se.

Because Williams did not establish that Culpepper's statements were actionable, the trial court properly entered a judgment as a matter of law for Culpepper in this regard.

II. Whether the trial court erred in its rulings involving the defamatory statements made by the NCAA in the penalty-summary report posted on the Web site, including the claim of invasion of privacy, which also stemmed from the statements made in the penalty-summary report.

In *Butler*, this Court defined the elements of the tort of invasion of privacy, stating:

> "'"This Court defines the tort of invasion of privacy as the intentional wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities."' . . .
>
> ". . . .
>
> " . . . [T]his Court has adopted the following definition for 'false light' invasion of privacy:
>
> "'"One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
>
> "'"(a) the false light in which the other was placed would be highly offensive to a reasonable person, and
>
> "'"(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed."'

"*Schifano v. Greene County Greyhound Park, Inc.*, 624 So. 2d 178, 180 (Ala. 1993) (emphasis omitted) (quoting *Restatement (Second) of Torts*

> § 652E (1977)). A false-light claim does not require that the information made public be private; instead, the information made public must be *false*. See *Restatement (Second) of Torts* § 652E cmt. A. (1977)."

871 So. 2d at 12.

Cottrell and Williams contend that they presented clear and convincing evidence that the NCAA made the false statements in the penalty-summary report with actual malice, creating, they say, a question for the jury to resolve. Specifically, they argue that the evidence established that the NCAA knew that the statements made in the penalty-summary report were false and that the NCAA exhibited a reckless disregard for the veracity of the statements when they published the penalty-summary report without proofreading the report for accuracy. Therefore, with regard to this claim Cottrell argues that the trial court erred in entering a summary judgment for the NCAA, and Williams argues that the trial court erred in entering a judgment as a matter of law for the NCAA.

> "'In a [defamation] action brought by a public figure, summary judgment for the defendant is appropriate unless the plaintiff produces the clear and convincing evidence that a reasonable jury would need in order to find that the defendant published the defamatory material with actual malice.' *McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1508 (C.A.D.C. 1996); see *Finebaum v. Coulter*, 854 So. 2d 1120, 1128-29 (Ala. 2003). '[T]here is no genuine issue [of material fact] if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find

actual malice by clear and convincing evidence.' *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986); see also *Pemberton v. Birmingham News* Co., 482 So. 2d 257, 259-60 (Ala. 1985).

"This standard is satisfied by proof that a false statement was made '"with knowledge that it was false or with reckless disregard of whether it was false or not."' *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 659, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989) (quoting *New York Times v. Sullivan*, 376 U.S. [254] at 279-80, 84 S.Ct. 710 [(1964)]). A defendant acts with 'reckless disregard' if, at the time of publication, the defendant '"entertained *serious doubts* as to the truth of [its] publication" or acted "with a *high degree of awareness* of . . . [its] probable falsity."' *McFarlane*, 91 F.3d at 1508 (quoting *St. Amant* [*v. Thompson*], 390 U.S. [727] at 731, 88 S.Ct. 1323 (1968)) (emphasis added). 'The actual malice standard is *subjective*; the plaintiff must prove that the defendant *actually* entertained a serious doubt.' *Id.* (emphasis added). See *Sanders v. Smitherman*, 776 So. 2d 68, 71 (Ala. 2000); *Finebaum*, 854 So. 2d at 1124; see also *Revell v. Hoffman*, 309 F.3d 1228, 1233 (10th Cir. 2002); *Flowers v. Carville*, 310 F.3d 1118, 1131 (9th Cir. 2002); *Chafoulias v. Peterson*, 668 N.W.2d 642, 654 (Minn. 2003).

"Malice can be shown by circumstantial evidence showing, for example, 'that the story was (1) "fabricated," (2) "so inherently improbable that only a reckless man would have put [it] in circulation," or (3) "based wholly on" a source that the defendant had "obvious reasons to doubt," such as "an unverified anonymous telephone

> call."' *McFarlane,* 91 F.3d at 1512-13 (quoting *St. Amant,* 390 U.S. at 732, 88 S.Ct. 1323). However, malice cannot be 'measured by whether a reasonably prudent man would have published, or would have *investigated* before publishing.' *St. Amant,* 390 U.S. at 731, 88 S.Ct. 1323 (emphasis added). Indeed, the failure to investigate does not constitute malice, unless the failure evidences '"purposeful avoidance,"' that is, 'an intent to avoid the truth.' *Sweeney v. Prisoners' Legal Servs.,* 84 N.Y. 2d 786, 793, 647 N.E. 2d 101, 104, 622 N.Y.S.2d 896, 899 (1995) (quoting *Connaughton,* 491 U.S. at 693, 109 S.Ct. 2678); see *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 332, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974)."

Smith v. Huntsville Times Co., 888 So. 2d 492, 499-500 (Ala. 2004).

Viewed in a light most favorable to Cottrell and Williams, the evidence indicates that DeWees, the creator of the penalty-summary report, made a clerical error when she was posting the report on the NCAA's Web site and does not indicate actual malice. Her deposition testimony and her testimony at trial clearly indicates that she was unaware that the statements were false and that the error was at most negligence. "A mistake is clearly insufficient to support a finding of actual malice." *Medure v. Vindicator Printing Co.,* 273 F. Supp. 2d 588, 598 (W.D. Pa. 2002); *Gulf Publ'g Co. v. Lee,* 434 So. 2d 687 (Miss. 1983); *Long v. Arcell,* 618 F.2d 1145, 1148 (5th Cir. 1980) (a defendant "who merely is careless may not be held liable for defaming a public figure"). Additionally, the evidence does not support a finding "of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible

publishers." *Curtis Publishing*, 388 U.S. at 158 (holding that such evidence of "extreme departure" from reasonable publishing standards can indicate actual malice). The trial court properly entered a summary judgment for the NCAA on Cottrell's claims of defamation and invasion of privacy involving the posting of the false statements on the NCAA Web site. Likewise, the trial court properly entered a judgment as a matter of law for the NCAA with regard to Williams's claims involving the Web site.

Williams contends that because the trial court changed his classification to a limited-purpose public figure at the close of his case-in-chief and thereby elevated his burden of proof to require that he present evidence of actual malice to establish a prima facie case of defamation, he was prejudiced and should be granted a new trial. When the trial court reevaluated Williams's classification at the close of his case-in-chief and determined that he was a limited-purpose public figure, the trial court permitted Williams to reopen his case to present evidence of actual malice with regard to the penalty-summary report. Williams presented DeWees's testimony. Williams did not argue that he had additional evidence of actual malice that he had been prevented from presenting. Additionally, he did not argue that the timing of the trial court's ruling impacted his trial strategy to his detriment or prevented him from presenting evidence. There is no evidence in the record that lends itself to a conclusion that Williams was prejudiced by the reclassification, and Williams did not, in his briefs to this Court or during oral argument, direct this Court to any evidence of prejudice. Therefore, any error in the trial court's changing Williams's burden of proof at the close of the evidence, in light of the trial court's allowing

Williams to reopen his case and present additional evidence, was at most harmless. Rule 45, Ala. R. App. P.

Cottrell further maintains that the trial court erred in entering a summary judgment for the NCAA on his claims of defamation and invasion of privacy with regard to the false statements in the penalty-summary report because, he says, the trial court erred in not considering the deposition of Shepard C. Cooper, the director for the COI, before making its determination. This issue, however, is not preserved for our review.

The trial court conducted a hearing on the summary-judgment motions on June 23, 2005; the order was issued on July 7, 2005; Cottrell deposed Cooper on July 8, 2005, and the trial began on July 12, 2005. At the June 23 hearing, the trial court stated that Cottrell could supplement his motion in opposition to summary judgment with the deposition testimony of DeWees and Cooper. Cottrell, however, was unable to depose Cooper until July 8, 2005, the day after the trial court issued its order. This Court recognizes that the transcription of Cooper's deposition required time; however, the record does not contain any request by Cottrell after the trial court issued its order for leave to file Cooper's deposition or a request that the trial court reconsider its summary-judgment decision in light of Cooper's testimony. "The purpose of requiring a specific objection to preserve an issue for appellate review is to put the trial judge on notice of the alleged error, giving an opportunity to correct it before the case is submitted to the jury." *Ex parte Works*, 640 So.2d 1056, 1058 (Ala. 1994). Moreover, "[t]his Court cannot consider arguments raised for the first time on appeal; rather, our review is restricted to the evidence and arguments considered by the trial

court." *Andrews v. Merritt Oil Co.*, 612 So. 2d 409, 410 (Ala. 1992); *Shiver v. Butler County Bd. of Educ.*, 797 So. 2d 1086, 1089 (Ala. Civ. App. 2000) (holding that an appellate court will not consider an issue on which the trial court was not given the opportunity to rule).

III. Whether the trial court erred in entering a summary judgment for the NCAA and Culpepper on the claims involving "conspiracy media leaks."

Cottrell and Williams contend that the trial court erred in entering summary judgments for the NCAA and Culpepper with regard to their claim of defamation involving "conspiracy media leaks" because, they say, they presented substantial evidence creating a genuine issue of material fact as to whether the NCAA and Culpepper conspired to defame them.

It appears that during the NCAA investigation, information about the NCAA's interviews conducted with Cottrell and Williams was published in various newspapers, sometimes the day after the interview. Cottrell and Williams maintained that the NCAA, specifically Johanningmeier, and Culpepper, leaked information to the media to make them the "scapegoats" of the investigation, to ruin their coaching careers, and to cast them in a bad light. Cottrell and Williams argue that the leak of the information was particularly objectionable in light of their efforts to cooperate with the NCAA and their refusal to discuss any part of the investigation with the press in accordance with the NCAA confidentiality rule. Cottrell and Williams maintain that although they abided by the confidentiality agreement, the NCAA did not.

Appendix A

In support of their argument, Cottrell and Williams cite evidence indicating that Johanningmeier spoke with media persons, including Culpepper and an investigative reporter for the American Broadcasting Company in Memphis, Tennessee, and that Culpepper and the investigative reporter published confidential information.

The news articles that Cottrell and Williams cite, however, referred to their sources as "sources close to the NCAA probe" and "sources close to the investigation." None of the articles cited by Cottrell and Williams stated that "the information contained therein emanated from conversations with NCAA personnel." The evidence established that several individuals were present during the interviews conducted by the NCAA. In addition to the person being interviewed and Johanningmeier, the evidence indicates that Marsh, Robbins, counsel for The University, and others attended and asked questions. Cottrell and Williams even stated in their complaint that some of the information came from Marsh. Additionally, Cottrell and Williams conceded in their depositions that they had no facts or evidence indicating that anyone at the NCAA leaked information to the press during the investigation. Finally, Cottrell and Williams did not present substantial evidence indicating that Culpepper made the statements allegedly leaked to the media. Therefore, based on this evidence, only speculation and conjecture support a conclusion that the NCAA or Culpepper conspired to ruin Cottrell and Williams and in furtherance of that conspiracy made these statements.

Viewing the evidence in a light most favorable to Cottrell and Williams, we conclude that substantial evidence was not presented that the NCAA or Culpepper

were the sources of the leaked information or that they conspired to leak information to the media and to make Cottrell and Williams the scapegoats of the NCAA investigation.

IV. Whether the trial court properly ordered a new trial.

Cottrell maintains that the trial court erred when it concluded that Culpepper was unduly prejudiced by its decision at the close of the evidence changing Cottrell's classification from a limited-purpose public figure to a private figure with regard to the defamatory statements made by Culpepper. Culpepper argued in his motion for a new trial that he was prejudiced by the trial court's ruling because during his cross-examination of Cottrell's witnesses and during the presentation of his defense, he elicited evidence to show that Cottrell's evidence did not establish actual malice. He further argued that if the law from the beginning of the case had been that Cottrell was a private person with regard to the statements made by him, he would have focused on defending against the lesser standard of common-law malice and he would have cross-examined Cottrell's witnesses to establish Cottrell's attitude about rule violations and the reasons why Culpepper disliked Cottrell. Culpepper's counsel further maintained that he would not have asked Culpepper questions such as, "[D]id you use good judgment at times with regard to saying things among your friends about Ronnie Cottrell?" Culpepper states that questions like these lend themselves to establishing common-law malice, not to defending against it. He further states that he would have "presented additional/different evidence and possibly called other witnesses."

We have thoroughly reviewed the record, and we conclude that Culpepper was prejudiced by the trial court's changing Cottrell's classification from a limited-purpose public figure to a private figure at the close of all the evidence. It is clear that Culpepper's strategy throughout the trial focused on establishing that Culpepper did not make the statements with actual malice and not on defending against a finding that he had made the statements negligently. Therefore, the trial court did not exceed the scope of its discretion when it ordered a new trial. *Hayden v. Elam,* 739 So. 2d 1088, 1093 (Ala. 1999)("[T]his Court will reverse an order granting a new trial when some legal right is denied and the record clearly shows that the trial court abused its discretion.").

V. Whether the trial court erred in denying Culpepper's motion for a judgment as a matter of law.

Culpepper contends that the trial court erred in denying his motion for a judgment as a matter of law because, he says, Cottrell did not present clear and convincing evidence that Culpepper made the statements with actual malice. Because we have concluded that Cottrell is a private person with regard to the statements made by Culpepper and did not have to present evidence of actual malice to establish a prima face case of defamation, this issue is moot. To the extent that Culpepper argues that the evidence does not support an award of punitive damages, we conclude that Cottrell presented sufficient evidence to create a jury question as to whether Culpepper made the statements with actual malice.

Although a failure to investigate alone does not indicate actual malice, evidence indicating the "purposeful

avoidance of the truth" is sufficient to meet the standard of constitutional malice. *Connaughton,* 491 U.S. at 692.

Culpepper admitted that he made the statements with no knowledge of whether the statements were true. Additionally, the evidence established that even though Cottrell had met with Culpepper in October 2000 to discourage Culpepper from making statements about him, Culpepper made these statements after December 2000. Therefore, viewing the evidence in a light most favorable to Cottrell, we conclude that he presented sufficient evidence to present a jury question as to whether Culpepper made the statements with actual malice.

VI. Whether the trial court erred in its rulings involving the relevance of agreement between Culpepper and the NCAA and Cottrell's request for a Hammond hearing.

Cottrell and Williams contend that the trial court erred in its rulings with regard to the admissibility into evidence of an agreement between Culpepper and the NCAA because, they say, the evidence is relevant to Culpepper's ability to pay damages. Additionally, they argue that the trial court erred in ordering a new trial because, they say, a *Hammond*[15] hearing would remedy any impropriety with regard to the award of punitive damages. Because we conclude that the trial court's grant of a new trial was proper, these issues are moot.

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[15] *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986).

VII. Whether the trial judge erred in refusing to permanently recuse himself.

Finally, Cottrell and Williams contend that this Court must order Judge Thomas S. Wilson, the trial judge who presided over his trial, to permanently recuse himself from this case. The record contains a letter from Judge Wilson to the Presiding Judge of the Tuscaloosa Circuit, dated August 7, 2006, stating:

> "This letter is to put in writing our conversation of last week regarding the [*Cottrell v. NCAA and Culpepper*] case. As I informed you there has been a motion to supplement the record on appeal. There is also currently pending in the Supreme Court a motion to have the Supreme Court order me to recuse myself from further proceedings in the Cottrell case. There is also pending before the Judicial Inquiry Commission a motion by [Cottrell and Williams's counsel] to have them reconsider their order dismissing [Cottrell's and Williams's counsel's] complaint against me. Finally, there is pending before the Montgomery Bar Association Disciplinary Committee, a complaint filed by me against [Cottrell's and Williams's counsel]. Based on all these matters I feel that it is best that I temporarily recuse myself from hearing any matters in the case till the above matters are resolved. Depending on the final disposition of the above matters, I may have to permanently recuse myself. However, for the time being, I am asking you to reassign the case to another judge to handle any matters that might arise till further notice."

The presiding judge reassigned the case.

Cottrell and Williams argue that the trial judge exceeded the scope of his discretion by not permanently recusing himself from the case. Specifically, Cottrell and Williams argue:

> "Judge Wilson's reasoning, however, is faulty, because the resolution of those matters, no matter how decided, cannot undo the appearance of bias nor erase the question of whether he can be impartial that was created by his bar complaint against [plaintiffs' counsel]."

In *Ex parte George,* [Ms. 1051568, December 15, 2006] ___ So. 2d ___ (Ala. 2006), this Court stated:

> "A trial judge's ruling on a motion to recuse is reviewed to determine whether the judge exceeded his or her discretion. See *Borders v. City of Huntsville,* 875 So. 2d 1168, 1176 (Ala. 2003). The necessity for recusal is evaluated by the 'totality of the facts' and circumstances in each case. [*Ex parte City of*] *Dothan Pers. Bd.,* 831 So. 2d [1] at 2 [(Ala. 2002)]. The test is whether '"facts are shown which make it reasonable for members of the public or a party, or counsel opposed to question the impartiality of the judge."' *In re Sheffield,* 465 So. 2d 350, 355-56 (Ala. 1984) (quoting *Acromag-Viking v. Blalock,* 420 So. 2d 60, 61 (Ala. 1982))."

___ So. 2d at ___.

The documents properly before this Court establish that Judge Wilson temporarily recused himself from this case and that he will consider permanent recusal, if circumstances require. Therefore, we cannot conclude based on the record before us that Judge Wilson exceeded

the scope of his discretion. We recognize that Cottrell and Williams have attached exhibits to their briefs appearing to support their contention. However, an exhibit attached to a brief is not proper evidence for this Court's consideration. See *Green v. Standard Fire Ins. Co. of Alabama,* 398 So. 2d 671, 673 (Ala. 1981) (the record on appeal cannot be changed or altered by statements made in appellate briefs or evidence not appearing in the record).

To the extent that Cottrell and Williams contend that this Court errs in refusing to consider the issue of Judge Wilson's recusal as a request for mandamus relief, we conclude that they have not established a clear legal right to the relief they request.

> "Mandamus is 'proper to compel a court to perform ministerial duties and to entertain jurisdiction,' *State v. Cannon,* 369 So. 2d 32, 33 (Ala. 1979); it is also the proper method by which to review whether recusal is required. *Ex parte Melof,* 553 So. 2d 554 (Ala. 1989).
>
> "We have often stated the standard for issuing a writ of mandamus:
>
> > "'A writ of mandamus is an extraordinary remedy, and it "will be issued only when there is: 1) a clear legal right in the petitioner to the order sought; 2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; 3) the lack of another adequate remedy; and 4) properly invoked jurisdiction of the court." *Ex*

parte United Serv. Stations, Inc., 628 So. 2d 501, 503 (Ala.1993).'

"*Ex parte Butts*, 775 So. 2d 173, 176 (Ala. 2000)."

Ex parte Little, 837 So. 2d 822, 824 (Ala. 2002).

The information before us indicates that Judge Wilson has recused himself from this case; therefore, Cottrell and Williams have not established that Judge Wilson has refused to recuse himself and that they have been denied a clear legal right to the relief requested. Mandamus relief based on the information before us is not proper.

Conclusion

Based on the foregoing, the judgment of the trial court ordering a new trial for Culpepper is affirmed; the judgment denying Culpepper's motion for a judgment as a matter of law with regard to his statement that Cottrell had abandoned his family is reversed; the judgment denying Culpepper's motion for judgments as a matter of law with regard to his statements that Cottrell stole funds from the Shaun Alexander Foundation and that Cottrell stole videotapes from The University's athletic department is affirmed; the judgment as a matter of law for Culpepper with regard to Williams's defamation claim is affirmed; the summary judgment for the NCAA with regard to Cottrell's claims of defamation and invasion of privacy is affirmed; the summary judgment for the NCAA with regard to Cottrell and Williams's claim of "conspiracy media leaks" is affirmed; the judgment as a matter of law for the NCAA with regard to Williams's claims of defamation and invasion of privacy is

affirmed; and this case is remanded for proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Cobb, C.J., and See, Lyons, Woodall, Smith, Bolin, and Parker, JJ., concur.

Murdock, J., concurs in the result.

See, J., files statement of nonrecusal (issued on April 25, 2007).

SEE, Justice (statement of nonrecusal).

Ronald W. Cottrell and Ivy Williams have filed a motion seeking my recusal in these appeals because I was a "fellow law professor and personal friend" of Gene Marsh, facts which, they assert, would cause a reasonable person to question my impartiality. I decline to recuse myself.

Canon 3.C.(1) of the Canons of Judicial Ethics states:

> "(1) A judge should disqualify himself in a proceeding in which his disqualification is required by law or his impartiality might reasonably be questioned, including but not limited to instances where:
>
> > "(a) He has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding."

Appendix A

As I explained in my statement of nonrecusal in *Dunlop Tire Corp. v. Allen,* 725 So. 2d 960, 976 (Ala. 1998), "[t]he Constitution of the United States and the Constitution of Alabama of 1901 impose on judges the duty to decide cases." *See also Pierson v. Ray,* 386 U.S. 547, 554 (1967) ("It is a judge's duty to decide all cases within his jurisdiction. . . ."); *Federated Guar. Life Ins. Co. v. Bragg,* 393 So. 2d 1386, 1389 (Ala. 1981) ("'[I]t is the duty of the judge to adjudicate the decisive issues involved in the controversy . . . and to make binding declarations concerning such issues, thus putting the controversy to rest. . . .'" (quoting 26 C.J.S. *Declaratory Judgments* § 161 (1956), pp. 374-75)). At the same time, "[t]he Due Process Clauses of the Constitution of the United States and of the Alabama Constitution require that a judge be a neutral decision-maker. U.S. Const. amend. XIV, § 1 ('No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .')." *Dunlop Tire,* 725 So.2d at 976 (See, J., statement of nonrecusal); *see also Concrete Pipe & Prods. of California, Inc. v. Construction Laborers Pension Trust for Southern California,* 508 U.S. 602, 617 (1993) ("[D]ue process requires a 'neutral and detached judge. . . .'" (quoting *Ward v. Village of Monroeville,* 409 U.S. 57, 61-62 (1972))).

Therefore, Canon 3.C.(1) must be applied in a way that balances the underlying policies of the judicial duty to decide cases and the need to preserve judicial impartiality. To serve the policy of preserving impartiality, courts require recusal not only for actual bias, but also for the appearance of bias. *See Ex parte Monsanto Co.,* 862 So. 2d 595, 605 (Ala. 2003) ("'"The question is not whether the judge was impartial in fact, but whether another person, knowing all the circumstances, might reasonably question

the judge's impartiality – whether there is an appearance of impropriety."'" (quoting *Ex parte City of Dothan Pers. Bd.*, 831 So. 2d 1, 5-6 (Ala. 2002), quoting in turn *Ex parte Duncan*, 638 So. 2d 1332, 1334 (Ala. 1994) (citations omitted))). In *Ex parte City of Dothan Personnel Board*, this Court stated:

> "The test that remains applicable at all times, the answer to which always depends upon the 'totality of circumstances' of each case, is whether a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find that there is a reasonable basis for questioning the judge's impartiality."

831 So. 2d at 11.

We presume that a judge is unbiased. *Ex parte Balogun*, 516 So. 2d 606, 609 (Ala. 1987) ("'For the law will not suppose a possibility of bias or favor in a judge who is already sworn to administer impartial justice and whose authority greatly depends upon that presumption and idea.'" (quoting *Fulton v. Longshore*, 156 Ala. 611, 613, 46 So. 989, 990 (1908))). "'"The burden of proof is on the party seeking recusal."'" *Monsanto*, 862 So. 2d at 605 (quoting *City of Dothan Pers. Bd.*, 831 So. 2d at 9, quoting in turn *Ex parte Cotton*, 638 So. 2d 870, 872 (Ala. 1994)); *see also Reeves v. State*, 580 So. 2d 49, 51 (Ala. Crim. App. 1990) ("'The general rule in Alabama is that there is a presumption that a judge is qualified and unbiased and a person who alleges otherwise has the burden of proving that grounds [exist] for his allegations.'" (quoting *McMurphy v. State*, 455 So. 2d 924, 929 (Ala. Crim. App. 1984))).

Appendix A

I have no personal bias or prejudice concerning any party to these appeals, nor do I have any personal knowledge of the facts of the case underlying these appeals. *See* Canon 3.C.(1), Canons of Judicial Ethics ("A judge should disqualify himself in a proceeding in which . . . [h]e has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. . . ."). Cottrell and Williams argue, however, that I should recuse myself from this case because during my time as a professor of law at the University of Alabama, "Dr. Gene Marsh, based upon information and belief, was a fellow law professor and personal friend of Justice See." Motion to recuse at 4. Professor Gene Marsh did join the law faculty while I was a member of that faculty, and I considered him and all the other members of that faculty friends. I would add to the "totality of circumstances" that it has been over 10 years since I left the law faculty at the University of Alabama. To the best of my recollection, during that 10 years I have spoken with Professor Marsh only once or twice, when I was at the law school in my capacity as a Justice of the Supreme Court. I have not spoken to Professor Marsh about this case, and, to the best of my recollection, he did not mention it when I saw him.

Cottrell and Williams argue that my relationship with Professor Marsh would lead a reasonable person to doubt my impartiality because Professor Marsh was formerly a defendant in this action and, they say, "has great disdain for [Cottrell and Williams]," Motion to recuse at 4-5; also, Professor Marsh is, they report, currently working with one of the appellees in this appeal – the National Collegiate Athlete Association. These allegations, however, do not overcome the presumption of impartiality. *See Reeves,*

580 So.2d at 51 ("'The fact that one of the parties before the court is known to and thought well of by the judge is not sufficient to show bias.'" (quoting *McMurphy,* 455 So. 2d at 929, citing in turn *Duncan v. Sherrill,* 341 So. 2d 946 (Ala. 1977))); *Ex parte Hill,* 508 So. 2d 269, 272 (Ala. Civ. App. 1987) ("[I]t is an inescapable fact of life that judges serving throughout the state will necessarily have had associations and friendships with parties coming before their courts. A judge should not be subject to disqualification for such ordinary relations with his fellow citizens."). Thus, considering the "totality of circumstances," I conclude that, "knowing all of the facts known to the [me]," there is not a "reasonable basis for questioning [my] impartiality." *City of Dothan Pers. Bd.,* 831 So. 2d at 11.

Because Cottrell and Williams's motion seeking my recusal does not establish actual partiality or demonstrate an appearance of partiality that would overcome the presumption of judicial impartiality, it is my constitutional duty to decide these appeals. *See* Ala. Const. 1901, § 279 ("'I will support the Constitution of the United States, and the Constitution of the State of Alabama . . . and . . . I will faithfully and honestly discharge the duties of the office. . . .'"). Therefore, I decline to recuse myself.

Appendix B

APPENDIX B – ORDER OF THE TUSCALOOSA COUNTY, ALABAMA TRIAL COURT ON SUMMARY JUDGMENT FILED JULY 7,2005

IN THE CIRCUIT COURT OF TUSCALOOSA COUNTY, ALABAMA

RONALD W. COTTRELL and IVY WILLIAMS,	§	
Plaintiffs	§	
VS.	§	CV 2003-810
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al.,	§	
Defendants,	§	

ORDER

(Filed Jul. 7, 2005)

This case came to be heard on 6/23/05 all defendant's motions for summary judgment. The plaintiffs bring five (5) counts in their complaints. The claims are as follows:

1. Libel and Slander.
2. Invasion of privacy.
3. Negligence.
4. Wantonness.
5. Civil conspiracy.

Prior to addressing the claims, however, there are some questions of law that must be addressed by the court.

First, if the plaintiffs are public figures, the plaintiffs must prove actual malice by the defendant's on the defamation claims. The parties are all in agreement as to the legal standard to be applied to determine if the plaintiff's are public figures. The dispute arises in applying the proffered facts to the law.

As one court stated: "Defining a public figure is like trying to nail a jelly fish to the wall" (Rosanova v Playboy Enterprises Inc, 411 F. Supp 440). A public figure can be a general-purpose public figure, or a limited purpose public figure. This court can say as a matter of law, without going into a lot of detail, that the plaintiffs do not satisfy the criteria of a general-purpose public figure. This would require the plaintiffs to have general fame or notoriety in the community, and pervasive involvement in ordering the affairs of society (Gertz v Welch 94 S.ct 2997).

A limited purpose public figure is determined by reference to the individual's participation in the particular controversy giving rise to the defamation (Gertz infra.) A person may become a limited purpose public in a matter of general public concern in one of four ways. By virtue of his position, by purposeful activity in thrusting themselves into the public controversy, their close involvement with the resolution of matters of public concern, or by being drawn into the controversy. It is undisputed that the controversy regarding the charges against the University of Alabama was a matter of public concern.

The court will then examine the four factors in reverse order. Since the Supreme Court decided Gertz, it has never again mentioned the "drawn into the controversy" factor again. This court has also not been able to find any other

significant case where by public figure status has been determined on that factor. Many legal experts feel that the Supreme Court has abandoned this factor (quote in Domby v Phoenix Newspapers Inc. 476 P2nd 724). Since, there exists no guidance or recent authority on this factor this court is not going to bestow public figure status on the plaintiffs based on the plaintiffs being involuntarily drawn into the controversy.

The third factor involves whether or not the plaintiffs have had a close involvement with the resolution of the controversy. The plaintiffs names were mentioned early in the controversy, but they had little involvement with the resolution of the controversy other than giving their statements, and testifying at the infractions committee hearing.

Factor two involves any purposeful activity in thrusting themselves into the controversy. The plaintiffs were under a gag order by the University of Alabama, and the NCAA. They made no comments to the media, and quietly sat back during the NCAA investigation.

The final factor involves looking at the individuals position with respect to matters of public concern, i.e. – does the plaintiffs' positions give them regular access to the media on a regular and continuing basis. The defendants have presented evidence that from time to time the plaintiffs spoke to red elephant clubs, and quarterback clubs. Further, from time to time articles, and interviews were given by them. There is also evidence that the head coach at the University of Alabama retains the duty to have regular access to the media, and comment on the team status in all areas, and all areas of publicity. The assistant coaches are not. From this point the evidence

stops as to plaintiff Ivy Williams. The court finds that as to plaintiff Ivy Williams, the facts of this case are similar to the Kentucky Supreme court case of Warford v Lexington Herald Leader (789 SW 2nd 758). Under the facts of that case the assistant basketball coach was found not to be a public figure. Likewise, this court finds that plaintiff Ivy Williams' position was neither in such a position of public prominence that he was in a position to influence others, or the outcome of the controversy, nor did he enjoy regular and continuing access to the media.

Plaintiff Ronnie Cottrell on the other hand was the recruiting coordinator at the University of Alabama. He was prominent enough that he was asked to have a charity golf tournament named after him. SEC Commissioner Roy Kramer stated in his deposition at page 256: "I told him since he got a lot of publicity, which he did for the good recruiting job he did at Alabama, he would always be under the scrutiny of other coaches, and other schools. We talked about that was a burden you pay as a publicized recruiting coordinator at a high profile school such as the U of A". The fact situation, as to plaintiff Cottrell, is more similar to the case of Barry v Time Inc. (584 F. Supp 1110). The coach in the Barry Case was in charge of recruiting at a school that had previously been found guilty of recruiting violations. In Alabama, football recruiting is a matter of intense public concern, and invited public attention. The recruiting coordinator position at Alabama is a high profile position through which the plaintiff Ronnie Cottrell could be expected to assume a role of public prominence, as pointed out by Commissioner Kramer. As such, plaintiff Cottrell would have access to the media, and a potential to influence the outcome of the controversy that a private person would not have. Based on the facts, and case law

presented the court finds, as a matter of law, plaintiff Ronnie Cottrell was a limited purpose public figure

The next issue, whether or not an absolute privilege applies to defamatory statements made during the committee on infractions (COI) hearings was made moot, when the plaintiffs clarified they are making no claims for statements made during the committee hearings. The plaintiff's defamation, false light, and conspiracy claims arise out of statements made during and after the investigative process.

The third issue is whether or not the affirmative defense of the two (2) year statute of limitations defeats recovery for any of the plaintiff's claims. The Alabama case of Poff v Hayes (763 So2nd 234) as cited by the defendants, stands for the proposition that in defamation cases, the two (2) year statute of limitations runs from the date of the publication. That date is the date the injury to reputation occurs. This lawsuit was filed on 12/20/02; therefore any defamatory statements made prior to 12/20/00 are barred by the two (2) year statute of limitations. Likewise, any other claims arising before 12/20/00 are time barred.

The fourth issue arises out of the defendant's affirmative defense of qualified privilege. The qualified privilege may apply where one acts in good faith in complying with a request for information from a third party (see Clark v America's First Credit Union 585 So2nd 1387). It also applies if it is prompted by a duty owed either to the public or a third party, or the communication is one in which the party has an interest and is made to another having a corresponding interest, if made in good faith, and without actual malice. The conditional, or qualified privilege would apply to the plaintiffs claims arising out of the

NCAA's letter of inquiry (LOI). It would also apply to the statements made by Tom Culpepper to defendant Richard Johanningmeier during the course of the investigation, and in the January and April 2001 conferences. The privilege can be overcome by proof that certain statements were not relevant to the investigation, were made in bad faith, or with actual malice. There is evidence before the court from which the jury could find that the privilege does not apply to some statements of defendant Tom Culpepper. There is no legally admissible evidence to overcome the privilege defense to the statements in the NCAA'S LOI.

These legal issues being decided, the court will now turn to the summary judgment motion. As a preliminary matter, this court was struck by the detailed time consuming, and thorough reconstruction of the NCAA investigation by the plaintiffs attorneys. One cannot help but conclude that Dr. Marsh and Ms. Robbins are good and law-abiding individuals who strove to run a clean program. If the NCAA, and SEC had made them privy to what Logan Young was doing, he would have been disassociated, Albert Means not signed, and the penalties against the University would have been less severe. There were two other major violations not involving the plaintiffs, which would have still resulted in severe sanctions against the U of A. However, after saying all this, the University of Alabama investigation is only peripherally related to this case. The conspiracy that is relevant is a conspiracy by the defendant's to defame the plaintiffs, and make them "the fall guys."

The court will first examine the claims brought against defendant Thomas Yeager, and Richard Johanningmeier. There is no legally admissible substantial evidence that these two defendants were guilty of any

actionable tortuous conduct as to the plaintiffs. The defendants have presented substantial evidence that these two defendants were not guilty of any tortuous conduct. The facts being undisputed, and these defendants being entitled to judgment, as a matter of law, summary judgment is granted in favor of defendant's Thomas E. Yeager, and Richard A. Johanningmeier, and against the plaintiffs on all claims.

The court will next examine plaintiff Ivy Williams' claims against the remaining defendants. Plaintiff's claims are limited to events that took place on, or after 12/20/00. Considering the evidence most favorably to said plaintiff, there is substantial evidence supporting a defamation claim of libel and slander against defendant Tom Culpepper. There is also substantial evidence supporting plaintiff's defamation, and invasion of privacy (false light) claims against the NCAA as a result of the publication on the NCAA web site. The negligence, and wantonness claims are subsumed within plaintiff's defamation claims, because that culpability is an element of the defamation claims.

There being no dispute of a material fact, and remaining defendants being entitled to judgment as a matter of law on all other claims, summary judgment is granted in favor of the remaining defendants on all other claims.

As to the claims of plaintiff Ronnie Cottrell against the NCAA, there is insufficient legally admissible evidence to support this plaintiff's burden of proving by clear, and convincing evidence, actual malice, to support any defamation claims. The plaintiff's negligence and wantonness claims must also fail, because these degrees of culpability will not support a cause of action arising out of defamatory acts against a public figure. The admissible facts do

not support a separate negligence, or wantonness claim. Therefore, defendant NCAA being entitled to judgment, as a matter of law, on all plaintiff's claims against defendant NCAA, summary judgment is granted in favor of defendant NCAA, and against plaintiff Ronnie Cottrell.

As to plaintiff Cottrell's claims against Thomas Culpepper, there is substantial evidence, if believed by a jury, supporting actual malice on said defendant's part, and defamatory statements which defendant Culpepper, either knew were false, or which were published with reckless indifference to their truth or falsity. As to the invasion of privacy claim, there was no substantial evidence, that the defendant made a publication to the public at large after 12/20/00. Further, there was no clear and convincing evidence of a conspiracy, to defame plaintiff Cottrell, specifically after 12/20/00 in support of a civil conspiracy claim. Further, there was no substantial legally admissible evidence that defendant Culpepper conspired with anyone to defame either plaintiff. Therefore, summary judgment is granted in favor of defendant Tom Culpepper, and against the plaintiff Ronald W. Cottrell on the civil conspiracy, and invasion of privacy claims. Summary judgment is denied as to the defamation and slander claim.

As a footnote on the damage issue, there is a great deal of evidence that plaintiff's damages, or injury to reputation was attributable to factors, other than the defendant's actions, such as: Milton Kirks' revelations, statements by the U.S. Attorney in Memphis, media articles, comments, and rumors proliferated by sports talk shows, and internet web sites. The degree of damage attributable to the defendants will, however, be a question for the jury to determine from all the evidence.

ORDERED this the 7 day of July 2005.

/s/ Thomas S. Wilson
THOMAS S. WILSON
CIRCUIT JUDGE

Appendix C

APPENDIX C – ORDER OF THE TUSCALOOSA COUNTY, ALABAMA TRIAL COURT GRANTING A NEW TRIAL FILED NOVEMBER 15, 2005

IN THE CIRCUIT COURT
FOR TUSCALOOSA COUNTY, ALABAMA

RONALD W. COTTRELL,
Plaintiff,

VS.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al,
Defendants.

CASE NO CV 2003-810

ORDER

(Filed Nov. 15, 2005)

This case came to be heard on two post trial motions. First, the court will consider defendant Tom Culpepper's motion for JNV or in the alternative motion for a new trial. After considering the arguments of counsel, this court finds that a new trial should be granted for three reasons.

The first reason is that the $30 million judgment is severely flawed. There was no reasonable relationship between the damages proven, and the damages awarded. The plaintiff had already suffered most of his damages by the time that the defamatory statements were made. The verdict was obviously the result of bias, prejudice, and emotions. If this were the sole reason for granting a new trial, the error could be cured by ordering a remittitur. However, there are two other problems.

The second reason is that the defendant Tom Culpepper was prejudiced when the court changed the law of the case by ruling that the plaintiff was not a public figure at the close of the evidence. As pointed out by the defendant, the evidence presented in defense of the claims would have been different if the court had not ruled as it did.

Finally, the defendant points out the case of Forrester v. WVTM TV, (709 So2nd 23). In this case the Court of Civil Appeals held that disciplining a child is a matter of public concern. Disciplining a child is not an illegal act. In a slander per se case, the plaintiff must prove that false statements were made by a defendant imputing a crime of infamy or a felony to the plaintiff. If disciplining a child is a matter of public concern, then a felony offense must be a matter of public concern. The significance of that fact arises, because it affects the proof required for a plaintiff to prevail. The law has always been, that slander per se can be proven by proof of common law malice. However, if the defamatory statement relates to a matter of public concern, then actual constitutional malice must be proven. The Court of Civil Appeals, in effect changed the law, to require proof of actual constitutional malice in any slander per se case. The court in the case at bar, allowed the case to go to the jury on proof of common law malice. For the foregoing reasons, the defendants motion for a new trial is granted.

The second motion argued was the Plaintiff's motion to reconsider this court's ruling on applicability of the indemnity agreement to payment of the judgment rendered by the jury in the case. This motion is now moot. There is no judgment to be collected. Conceivably, in the new trial different evidence could be presented that would

change this court's mind on applicability of the indemnity agreement to the judgment.

Ordered this 15th day of November 2005.

/s/ Thomas S. Wilson
CIRCUIT JUDGE

APPENDIX D – CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

U.S. Const. amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ala. Code § 12-21-142:

> No person engaged in, connected with or employed on any newspaper, radio broadcasting station or television station, while engaged in a news-gathering capacity, shall be compelled to disclose in any legal proceeding or trial, before any court or before a grand jury of any court, before the presiding officer of any tribunal or his agent or agents or before any committee of the Legislature or elsewhere the sources of any

information procured or obtained by him and published in the newspaper, broadcast by any broadcasting station, or televised by any television station on which he is engaged, connected with or employed.

National Collegiate Athletic Association Administrative Bylaws, Committee on Infractions – Special Operating Rule 32.1.4:

Cooperative Principle. The cooperative principle imposes an affirmative obligation on each member institution to assist the NCAA enforcement staff in developing full information to determine whether a possible violation of NCAA legislation has occurred and the details thereof. An important element of the cooperative principle requires that all individuals who are subject to NCAA rules protect the integrity of an investigation. A failure to do so may be a violation of the principles of ethical conduct. The NCAA enforcement staff will usually share information with the institution during an investigation; however, it is understood that the staff, to protect the integrity of the investigation, may not in all instances be able to share information with the institution. *(Adopted:1/12/99)*

Appendix E

APPENDIX E – CORRECTED BRIEF OF APPELLANTS FILED ON SEPTEMBER 15, 2006

IN THE SUPREME COURT OF ALABAMA

Nos. 1041858, 1050436 & 1050437

RONALD W. COTTRELL AND IVY WILLIAMS,

Appellants,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, TOM CULPEPPER, ET AL.,

Appellees.

On Appeal from the Circuit Court Of Tuscaloosa County, Alabama, No. CV-03-810.

***Corrected* BRIEF OF APPELLANTS**

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Appendix E

[i] **STATEMENT REGARDING ORAL ARGUMENT**

Appellants Ronald W. Cottrell and Ivy Williams respectfully *request* oral argument on the many complex legal and factual issues raised by this appeal and the related cross-appeal filed by Appellee/Cross-Appellant Tom Culpepper.

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[1] **STATEMENT OF THE CASE**

The following procedural history of this case is lengthy. However, in order to understand the issues raised on appeal, Your Honors need to be familiar with the many rulings in the circuit court's handling of this case and the context in which they occurred.

I. PRE-TRIAL PROCEEDINGS.

On December 20, 2002, Plaintiff Ronnie Cottrell, a former assistant football coach at the University of Alabama, filed a Complaint against the National Collegiate Athletic Association ("NCAA"), its employees Thomas Yeager and Richard Johanningmeier (hereinafter collectively "the NCAA Defendants"), Tom Culpepper, Dr. Gene March, Marie Robbins, Paul Finebaum, and Clear Channel Communications, Inc. The case was initially filed in the Circuit Court of Montgomery County, alleging several claims, including: (1) libel, slander, and defamation; (2) false light-invasion of privacy; (3) wantonness; and (4) civil conspiracy. [C.1-54] The Defendants then moved to transfer venue. [C.94-133;118-120;121-136] Cottrell eventually dismissed the claims against Finebaum and Clear Channel Communications. [C.653-56] The Montgomery Circuit Court granted the venue motion, and the case was transferred to the Tuscaloosa Circuit Court and assigned to Judge Thomas S. Wilson in May 2003. [C.790]

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In July 2003, the Complaint was amended to add former Alabama [2] assistant football coach Ivy Williams as a Plaintiff and to add a negligence claim. [C.932-1076] **In August, the court granted the Defendants' request to stay discovery and set a hearing on their renewed motions to dismiss.** [C.1090-1095] **Judge Wilson then considered the evidentiary submissions of the Defendants in support of the motions to dismiss, even though at the same time it had ordered that Plaintiffs' discovery be stayed.** [C.1582] In October 2003, the court issued an order dismissing several of the Plaintiffs' claims as to all of the Defendants, and dismissing a claim of interference with business relations as to all Defendants except Marsh and Robbins.[1] [C.1582-1588]

Before discovery resumed, the NCAA and Culpepper filed several motions requesting the trial court to enter a *protective order* relating to all testimony and information they would be requested to give in the action either through depositions, requests for production, or admissions. [C.1605;1696] Judge Wilson granted the request and adopted the NCAA's proposed Protective Order, which *very broadly* prohibited the parties from disseminating to the media or the public "any information, document, or thing produced or created in connection with this litigation," which was designated by the producing party as "confidential material." [C. 2048-55] The Order further stated that

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[2] [1] The Plaintiffs dismissed all their claims against Marsh and Robbins, after they had provided sworn affidavits providing evidence supporting the case, and dismissed Hilliard as well. [C.2105;2587-2615,2721-22]

[3] "[a]ny document filed with the Court for any purpose that reveals or refers in any manner, directly or indirectly, to any Confidential Material shall be filed under seal in a sealed envelope. . . . . Documents so labeled shall be kept by the clerk under seal and shall be made available only to the Court or persons authorized by the terms of this Order to have access to." [C. 2052]

In August 2004, upon motion by the NCAA, Judge Wilson issued an order granting a partial summary judgment in favor of the NCAA and against the Plaintiffs for any claims of injuries to the University of Alabama, Logan Young, Albert Means, or any other person or entity not joined as a party to the lawsuit. [C.2771] This ruling was unusual because the Complaint had not sought to bring any claims for injuries to the University of Alabama, Logan Young, or Albert Means.

As the July 2005 trial date neared, the Plaintiffs were still left with many discovery requests to which the Defendants had not properly responded. In April 2005, Plaintiffs issued new document requests to the NCAA and Culpepper specifically requesting a document that they recently learned about,[2] "the Settlement Agreement entered into on or [4] around November 15, 2004, between

---

[3] [2] At some point early in this litigation, Culpepper apparently threatened the NCAA with some type of legal action. An oral settlement agreement was entered into in July 2004 and then a written one in November 2004. The written agreement contained provision for the payment by the NCAA of Culpepper's attorney fees, as well as an indemnity agreement covering this litigation. The existence of the oral and the written agreement were withheld from Plaintiffs by the Defendants until March 2005, only a few months before trial.

the NCAA and Defendant Culpepper whereby the NCAA agreed to pay the legal fees of Tom Culpepper." [C.3167-70] When these Defendants refused to produce the documents, the Plaintiffs filed a motion asking the court to order Culpepper to produce the settlement agreement. [C. 4977-78] The trial court granted the motion on May 25, 2005, and ordered Culpepper to produce the settlement agreement within ten days. [C.4977-78] However, Culpepper refused to produce the agreement, so the Plaintiffs again moved the court to order the NCAA to produce it. [C.5002] The Plaintiffs also served another request for production to the NCAA and Culpepper requesting any and all documents in relation to "any and all settlement negotiations between the NCAA and Tom Culpepper from January 2003 to the present." [C.5012-15] When a month had passed since the court's order requiring the production of the agreement, the Plaintiffs filed a motion for sanctions against Culpepper and the NCAA. [C.8595-96]

During the time the Plaintiffs were attempting to obtain production of much outstanding discovery, the NCAA Defendants and Culpepper filed motions for summary judgment, supported by briefs and voluminous exhibits. [C.3195-4963;5030-5942] Although they had not obtained their important requested discovery, the Plaintiff filed pleadings and exhibits in opposition to the summary judgment motions. [C.5956-8308;8492-8510;8511-8550;11881-11885]

[5] On June 23, 2005, the court held a lengthy hearing on outstanding motions, most notably Defendants' motions for summary judgment and the parties' requests to take

additional depositions after the discovery deadline.[3] [R.369-572] The NCAA also filed evidentiary submissions with the court on the day before of the hearing [C.11375-11824], outside the 10-day requirement of Rule 56, Ala.R.Civ.P, which the court allowed. The court then denied Plaintiffs' efforts to quash the use at trial of NCAA's undeposed witnesses – Cheryl DeWees and Shep Cooper – who the NCAA had added to its witness list after the cut off date. Both were NCAA employees who were witnesses for the NCAA's defense of "lack of malice." Because the trial court allowed the NCAA to use these witnesses, it granted leave for Cottrell and Williams to take their depositions after the discovery deadline. **In connection with the rulings, Judge Wilson stated on the record that he would allow the parties to submit the deposition transcripts of DeWees and Cooper in** [6] **opposition to or as support for the Defendants' motions for summary judgment.** [R.569-71;672-81] **Judge Wilson further stated on the record that he would *not* rule on the NCAA's Motion for Summary**

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[5] [3] It was around the time of the June 23, 2005, hearing that the NCAA provided Judge Wilson with a document the NCAA titled "Overview of NCAA Defendants' Reasons why Summary Judgment is Appropriate." [C.5943-55]. This document, which Plaintiff's counsel was not provided a copy of, not informed of, which has no certificate of service, and was not filed with the Clerk's office, was plainly an *ex parte* "crib sheet" that provided a "road map" for Judge Wilson to follow in ruling for the Defendants' summary judgment motion, which he did earlier than expected and before two deposition transcripts could be filed. Plaintiffs counsel only learned of this document when one of their counsels' law clerk discovered it in a stack of materials that was brought out from the Judge's chambers after the trial and placed in the Clerk's office along with the record of the case. Plaintiffs requested that all the documents be placed in the Record on Appeal; however, not all the documents were included.

Judgment until the Sunday before the trial or the Monday morning of the trial, which was necessitated by the fact that the two depositions had to be taken in locations remote from the court and then transcribed and gotten into the judge's hands. [R.569-571] Counsel for Cottrell and Williams made plans to go to Indianapolis, Indiana to take DeWees' deposition on the following Friday, July 1, 2005, with Cooper's deposition scheduled for Wednesday, July 6, in Florida. [C. 12557-59]

On June 24, 2005, the court held a hearing in chambers on Plaintiffs' motion for sanctions in regards to the Defendants' failure to produce the settlement agreement between them and on the Defendants' motions to vacate the court's order granting the Plaintiffs' motion to compel. [R.573-612] **Judge Wilson stated that he would take the matter under advisement and ordered the production of the indemnity agreement for an *in camera* inspection.** [R.610-11] **However, Plaintiffs later discovered that counsel for the Defendants had attended the *in camera* inspection, while the Plaintiffs were *not* afforded the opportunity to attend, or to view the agreement.**

The deposition of NCAA employee DeWees, taken in Indianapolis on July 1, resulted in evidence on the issue of whether the NCAA acted [7] knowingly and wrongfully, rather than negligently, in publishing false and defamatory statements regarding the Plaintiffs on its internet web site. [C.12007-12404] The Plaintiffs also learned from DeWees key facts relating to the NCAA's computer records. On the following Tuesday, July 5, 2005 (now just a week before trial), the NCAA Defendants' counsel requested that

the second deposition, that of their proposed trial witness Cooper, be delayed, and taken on Friday, July 8, instead of on July 6, because of alleged scheduling problems for Cooper.[4] In an effort to cooperate, counsel for Plaintiffs agreed to reschedule the deposition for the requested later date. [C. 1243-12945]

However, just two days later, on Thursday, July 7, 2005, at what was originally scheduled as simply a pretrial conference and before the postponed Cooper deposition, Judge Wilson issued an order granting the Defendants' motions for summary judgment on almost all claims. [C.12567-74] **The court's ruling was issued several days earlier than it had previously stated it would rule, and the court ruled without the benefit of review of the transcripts of the depositions of DeWees and Cooper. This order "gutted" the Plaintiffs' case because it effectively precluded the Plaintiffs from litigating their claims based** [8] **upon the conspiracy alleged in the Complaint. Moreover, the ruling occurred without the court allowing the Plaintiffs the opportunity to supplement their opposition to the summary judgment motions with the testimony of the DeWees and Cooper, as the court had promised.**[5] The trial court's

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[7] [4] As an inducement to obtain Plaintiffs' agreement to the three day delay which it needed, NCAA counsel gave their assurance that the court reporter could still get the transcript to Judge Wilson before the Sunday or Monday date that he had announced that he would rule on the summary judgment motions.

[8] [5] The Plaintiffs had filed the DeWees deposition transcript with the court as an exhibit in opposition to the summary judgment motions just before their counsel entered the courtroom on what was thought to be an ordinary pretrial conference. [C. 12575-622]

premature ruling was in conflict with Rule 56(f), Ala.R.Civ.P., which had been the basis of the trial court's decision to defer its ruling until after the two depositions were taken and submitted to the court. In its order, the court ruled that Cottrell was a *limited purpose public figure*, yet fellow assistant football coach, Williams, was a *private figure*, and granted a judgment in favor of the NCAA on all of Cottrell's claims against it and as to all but two of Williams' claims against it.[6] [C.12567-74]

Thus, the only claims that remained to be tried to the jury were: (1) Williams' claims against the NCAA for defamation and false-light [9] **invasion of privacy, (2) Williams' claim against Defendant Culpepper for defamation, and (3) Cottrell's claim against Defendant Culpepper for defamation. At this same hearing, the court, privately in chambers, orally *withdrew* its earlier order compelling Culpepper to produce his settlement agreement with the NCAA, thereby denying Plaintiffs the opportunity to review the agreement, or to make an argument as to its relevance.** [R.618]

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[8] [6] On July 12, the first day of trial, the court issued a follow-up order on the Defendants' summary judgment motions wherein it stated that it had reviewed the DeWees deposition transcript that the Plaintiffs had submitted on July 7. [C.12949] The court stated in the Order that while the deposition transcript provided further evidence of negligence and wantonness, the deposition did *not* provide any evidence of actual malice on the NCAA necessary to change the ruling of the court as it affected Cottrell's defamation claim. However, the court did *not* ever review the Cooper deposition in relation to the summary judgment order. *See* Exhibit 1 hereto (which included the Cooper deposition)

In light of DeWees' deposition testimony, the Plaintiffs filed their second motion for sanctions against the NCAA for failure to produce the requested documents. [C.12642-12861] The court ordered the NCAA to produce responsive documents; however, no documents were ever produced and the court did not enforce its ruling. [R.633,646] With the trial looming just a few days ahead, and still missing critical discovery, on July 8 the Plaintiffs filed with this Honorable Court an emergency motion for a *stay* of the July 11 trial, so that a petition for writ of mandamus could be filed and discovery obtained. [C. 12971-12991] This Court *denied* the request for stay. [C.12992]

II. THE TRIAL.

Following voir dire [R.876-1101], the Plaintiffs asserted a *Batson* challenge based upon the Defendants having struck 17 of the 18 African American jurors on the jury panel, and having used 14 of their first 20 strikes upon those African Americans. [R.1088-1100] The trial court [10] initially ruled that Plaintiffs had shown a prima facie case of discrimination under *Batson*. [R.1090] However, counsel for the NCAA then provided Judge Wilson, and only Judge Wilson, what they claimed was a photocopy of an opinion from this Court which they said supported their position that a prima facie case had not been shown. The opinion appeared to have a handwritten note attached to it or written on it. **Despite repeated requests, both Judge Wilson and the NCAA refused to provide Plaintiffs a copy of the document. The court then reversed its previous ruling, and ruled that Plaintiffs' had failed to establish a prima facie case of discrimination under *Batson*.** [R.1088-1100,2256-58]

After a week of trial, the Defendants moved the court for a judgment as a matter of law on all claims. [R.2683-2729] **The court then *reversed* its pre-trial ruling that Williams was a private figure, held that he was a "limited purpose" public figure, and ruled that because Williams had failed to prove "constitutional" actual malice on the part of any of the Defendants they were due to be granted a judgment as a matter of law.** [R.2683-2728] This ruling changing Williams' status and his burden of proof *after* he had rested his case prevented him from having notice and being able to present evidence of such type of malice.

The trial resumed with only Cottrell's claims against Culpepper. [R.2753] When Culpepper, the only remaining defendant, finished his [11] case in rebuttal and rested, Plaintiffs asked the court to reconsider (as had been done with Williams), based on the nature of Culpepper's defamatory statements, its pre-trial ruling that Cottrell was a limited purpose public figure. The court did so, and ruled that as to Culpepper's statements, Cottrell was a "private figure." [R.3167;3174-3177] **The jury was then charged and after deliberation, it returned a verdict in favor of Cottrell in the amount of $6 million in compensatory damages and $24 million in punitive damages.** [R.3250]

III. POST-VERDICT PROCEEDINGS.

In preparation for post-verdict proceedings, in August 2005, Cottrell filed a renewed motion for discovery of the settlement agreement between Culpepper and the NCAA, and documents pertaining to it. [C.13053-57] The court held that the agreement was discoverable and that it

would be released to the Plaintiffs 14 days after the date of the order. [C.13148-49] **However, Judge Wilson invited Culpepper to file a writ of mandamus with this Honorable Court to "prevent its discovery" and, before Cottrell's counsel had seen the agreement or made argument relating to its text, ruled that the agreement was "irrelevant, and inadmissible in an post-judgment hearing in this case, because it does not indemnify Culpepper for any damages assessed by the jury in this case."** [C.13148-49] The 14 days passed without Culpepper filing a mandamus petition. The Plaintiffs then sought to obtain the [12] document from the Clerk's office, where the court's own confidentiality order required it to have been filed under seal following the court's *in camera* review, but were informed that the document had never been filed with the Clerk's office. The Plaintiffs asked Judge Wilson about the location of the agreement and were informed that he had instead kept it in his office and had "misplaced" or "lost" it. The document the court had maintained custody of was never located, and Cottrell's counsel were instead provided a document purported to be another copy of the same agreement. [C.13148-49] The court also ordered Culpepper to produce correspondence between him and the NCAA leading to the agreement in order to help the court determine if the correspondence affected the terms of the agreement. [C.13737-62]

Thereafter, Culpepper filed a "Renewed Motion for a Judgment as a Matter of Law and for a New Trial or in the Alternative to Set Aside Damage Award or for Remittitur." [C.13154-81] The court permitted Cottrell to take the depositions of Culpepper and Elsa Cole, General Counsel for the NCAA. After taking the depositions, Cottrell filed

his pleading in opposition to Culpepper's post-judgment motion [C.13619-730], and also moved for a *jury trial* on the effect of the settlement agreement between Culpepper and the NCAA. [C.13884-94]

On November 15, 2005, the court granted Culpepper's motion for a new trial and held that the meaning of indemnity provision in the [13] settlement agreement was moot. [C.13895-96] The court's order stated that it had three reasons for granting the motion: (1) that the $30 million verdict was "severely flawed" and "obviously the result of passion, bias, prejudice, and emotions," (2) that Culpepper was prejudiced by the court modifying its ruling on Cottrell's status after the close of the evidence to hold he was a private figure; and (3) that in the opinion of *Forrester v. WVTM TV,* 709 So.2d 23 (Ala.Civ.App. 1997), the Alabama Court of Civil Appeals *changed the law* of slander by requiring proof of constitutional actual malice in any slander per se case, and that Cottrell's claim against Culpepper was allowed to go to the jury on proof of common law actual malice. [C.13895-96]

The Plaintiffs filed a timely Notice of Appeal.[7] [C.13966-14036] Culpepper then filed a cross-appeal.

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[13] [7] One of Plaintiffs' counsel also filed a Judicial Inquiry Commission complaint against Judge Wilson, who then filed an Alabama State Bar Association complaint against that counsel. *See* Exhibit 2. Plaintiffs then filed a Motion for Disqualification or Recusal of the judge based upon these two filings. [C.13966-14036] Because the trial court did not rule on the recusal motion within 14 days, Plaintiffs moved this Court to supplement the Record with the relevant documents so the non-recusal could be raised in the appeal. Judge Wilson has subsequently recused, but only "temporarily" (*see* Exhibit 3), leaving his failure to do so fully an issue before this Court should a new trial be ordered..

Appendix E

[C.14037-44] This Court ordered appellate mediation, which occurred in March 2006. [C.14046-47] While both the Plaintiffs and their counsel attended, none of the individual Defendants appeared and the NCAA did not send a representative. Only their respective legal counsel attended the mediation, which was [14] unsuccessful, lasting less than half a day. This appeal was then reinstated. [C.14047]

STATEMENT OF THE ISSUES

The overriding issue in this appeal, which encompasses several sub-issues, is whether the circuit court erred in its rulings and conduct of the case such that the Plaintiffs were improperly prevented from obtaining the justice they sought. The sub-issues include the following:

(1) Whether the circuit court erred by granting the motion for summary judgment of the NCAA Defendants as to Cottrells' claims against them based on the conclusion he was a limited purpose public figure (even though he was under an NCAA "gag order" during the investigation) and failed to meet his burden of proof in showing constitutional actual malice?

(2) Whether the circuit court erred by granting the motion for judgment as a matter of law, filed at the end of the Plaintiff's case during trial, as to Williams' claims against Culpepper and the NCAA Defendants by holding he was a limited purpose public figure (even though he was under an NCAA "gag order" during the investigation) and failed to meet his burden of proof in showing constitutional actual malice?

(3) Whether the circuit court erred in granting Culpepper's [15] motion for a new trial following the jury's verdict in favor of Cottrell?

(4) Whether this Court should order, following remand for entry of a judgment on the jury verdict, a jury trial on the meaning and effect of the indemnity agreement between Culpper [sic] and the NCAA?

(5) Whether Judge Wilson must be permanently recused/disqualified should this Court order any type of further proceedings in the trial court?

STATEMENT OF THE FACTS[6]

I. INTRODUCTION.

The University of Alabama has a storied tradition of success with its intercollegiate football program. Thinking

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[15] [6] There were many, many facts, both disputed and undisputed, established in the record below, both before and during trial. Because the Record on Appeal is very lengthy, a reference to every fact established is impossible and this Statement of Facts is not represented as being comprehensive of every fact in the record below. Only the facts which Cottrell and Williams believe are most relevant to the issues they have raised in this appeal are presented herein.

[15] It should also be noted that both the NCAA Defendants and Culpepper moved to strike much of the information present in affidavits submitted by the Plaintiffs. [C.8565-95,8717-43] These motions were opposed by the Plaintiffs. [C.8753-8877] The circuit court never specifically ruled on the motions, and thus did not differentiate which facts asserted in the affidavits were admissible evidence, and which were not. To the extent this Statement of Facts contains evidence which the circuit court may have found to be inadmissible, the Plaintiffs assert that the court committed legal error in such a conclusion. This Honorable Court is certainly capable of differentiating between admissible affidavit testimony and that which is not.

of the Alabama football [16] team brings to mind giants of the sport, such as coaches Paul "Bear" Bryant and Gene Stallings, and players such as Joe Namath and Shaun Alexander. However, over the years many much lesser-known persons, now mostly forgotten, have played important roles in Alabama's success, such as the many assistant coaches the team has had through the years, including the Plaintiffs below, Ronnie Cottrell and Ivy Williams.

Both Coach Cottrell and Coach Williams were successful Division I-A college assistant football coaches when they joined the coaching staff of the Alabama football team during the 1990's, and their future appeared bright. However, they are now toiling far below their prior level of professional success, and the facts of this case tell the story of their sudden fall, caused by a complex conspiracy to bring NCAA sanctions upon the Alabama football program.

This appeal raises issues involving claims which were resolved before trial on summary judgment based on a broad set of facts, and claims that were resolved during trial on more narrow facts. Thus, this brief has *two* separate Statements of Facts. The first Statement of Facts provides facts presented to the circuit court upon Defendants' motions for summary judgment and sets forth the case which the Plaintiffs intended to try to a jury, while the second Statement of Facts provides the much smaller set of facts which the court, through its various rulings, actually allowed to be presented at trial.

Appendix E

[17] II. STATEMENT OF FACTS AT SUMMARY JUDGMENT STAGE.

A. Coaches Ronnie Cottrell and Ivy Williams.

Ronnie Cottrell was a head football coach at several high schools in Alabama football for six years before he was offered a position in 1989 as a graduate assistant coach at Florida State University. [C.5966] He then became an assistant coach and recruiting coordinator. [C.5966] In late 1997, he was hired as an assistant coach at Alabama and he became the recruiting coordinator in early 1998. [C.5965].

Ivy Williams was a Division I-A assistant football coach for eighteen years, and an assistant coach in the National Football League for two and a half years before he took a coaching position at the University of Alabama ("Alabama") in 1994. [C.5979-83,7068].

B. Formation of the Conspiracy Against the University of Alabama Football Program.[9]

As early as 1998, University of Tennessee head football Coach Phillip Fulmer began expressing his concerns to then Southeastern Conference Commissioner Roy Kramer regarding Alabama's recruitment of high school football players and the involvement of Alabama booster Logan Young of Memphis. [C.6202-03] From April to September of 1998, Fulmer

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[17] [9] While the purpose of the conspiracy was to bring NCAA sanctions upon the Alabama football program, the actions of the conspiracy also caused the Plaintiffs to suffer harm and the Plaintiffs' claims are based upon the legal wrongs done to them, not that done to Alabama.

sent Kramer numerous memorandum detailing numerous rumors about [18] Logan Young and his alleged "buying" of football players for Alabama. [C.6401-02,6403-15,6417-19,6421] Fulmer recommended that Kramer contact certain persons to gather information on Young. [C.6404-08]

Kramer responded by hiring SEC contract investigator Bill Sievers, a former FBI agent, to substantiate Fulmer's claims. [C.6202-03,6258-68,6435,6437,6494] Sievers was instructed to report directly to Kramer. [C.6463] Sievers sought information from Fulmer, the FBI, the Tennessee Bureau of Investigation, the Tennessee Attorney General's Office, the U.S. Justice Department, private investigators, and others. In June 1998, Sievers hired Memphis private investigator Ed Bradberry to gather information about Young by such means as observing Young at his hangouts, picking through his trash, and identifying any financial transactions. [C.6704,6936]. The SEC employed Bradberry through at least August 1998. [C.6938] Kramer received reports from Sievers during 1998, including one that noted Sievers was having discussions about Alabama with Richard Johanningmeier of the NCAA. [C.6202-10]

In the summer of 1999, Sievers provided Kramer information that a high school coach in Memphis was soliciting monetary offers from college recruiters in exchange for one of his players. In a July 26, 1999, memorandum to Kramer, Sievers detailed a telephone interview with Tennessee assistant football coach Pat Washington, who was recruiting Albert Means, a highly recruited player at Trezevant High School in [19] Memphis. [C.6941-42]. According to Sievers, Washington reported that on May 4, while visiting with head coach Lynn Lang at

Trezevant, Lang asked for a house and a car for Means' mother and money for himself in return for telling Means to sign with Tennessee. [C.6941-42] Sievers recommended having Lang prosecuted for "soliciting a bribe and extortion." [C.6942] Thus, at least as early as July 26, 1999, Kramer had knowledge of problems surrounding the recruitment of Means, yet he and the SEC office failed to provide the information to law enforcement to prosecute Lang, and they (and the NCAA as well)[10] failed to notify Alabama, who was recruiting Means. [C.6950-51] Thus, Alabama continued to recruit Means, whereas if Alabama had been given the information that his coach had offered Means to other colleges in return for a sum of money, Alabama would not have signed him to scholarship papers. [C.6950-51]

Alabama had a great football season in 1999 and won another SEC Championship. Alabama then unwittingly signed Means to a football scholarship in February 2000, giving the conspiracy the final piece it needed. Just a month later, in March 2000, NCAA investigator Johanningmeier began a secret investigation of Alabama's recruitment of [20] Albert Mean and other players, starting with interviewing Fulmer and several Tennessee assistant coaches. [C.6966]

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[19] [10] According to Sievers, it was routine for results of his investigation to be furnished to the NCAA, but that universities seldom ever got copies of the reports that Kramer received. [C.6463-64] His findings were normally forwarded to the NCAA after his investigation. [C.6469]

C. Culpepper Joins the Conspiracy and Makes Defamatory Statements Regarding Cottrell and Williams.

In May 2000, Fulmer became a confidential witness for the NCAA's investigation. [C.6986]. Fulmer told Johanningmeier that he was aware that college football recruiting analyst Tom Culpepper had knowledge about Logan Young buying high school football players for Alabama. [C.6986-87] Fulmer also directed Johanningmeier to the coaching staffs at several universities for additional information. [C.6988]

Near the end of July 2000, Culpepper met with Fulmer in Knoxville and talked about Young's involvement in Alabama's recruiting efforts. [C.7098-99] Culpepper met with Fulmer and Fulmer's attorney in Chattanooga several days later. [C.7099-7100,7104-05] During this meeting, Fulmer enlisted Culpepper to cooperate with the NCAA's investigation of Young and Alabama. [C.7175] Culpepper agreed, motivated by his belief that Cottrell had unfairly cut him off from insider access to the Alabama football program, which was vital for his career as a recruiting analyst. [C.5967] However, all Cottrell had done was follow the direction of head coach Mike Dubose in limiting recruiting analysts' access to the football offices. [C.5967]

On August 13, 2000, Johanningmeier traveled to Birmingham to interview Culpepper. [C.7179] Culpepper told Johanningmeier rumors of [21] alleged NCAA rules violations by Young, Cottrell, and Williams [C.7179-7200], though he said he did not want his information to be directly used against Alabama. [C.7190] **However, Culpepper *did* want the NCAA to take aim at**

Cottrell, as near the end of the interview, Culpepper asked for something that came true about a year-and-a-half later. Culpepper said: "[I]f there were any justice in the world, you'd simply not allow Ronnie Cottrell to coach in the NCAA." [C.8533]

Even when the NCAA gained Culpepper as a witness in its investigation in August 2000, it still failed to notify Alabama that there were questions surrounding the recruitment of Albert Means, who was about to enroll for his freshman year. The NCAA had vital knowledge of potential problems surrounding Means' recruitment from at least 10 different sources prior to Means starting fall practice.[11] Alabama could have blocked Means from participating in football practice and playing in the 2000 season, had the NCAA been forthcoming with their information.[12] Instead, Gene Marsh, then Alabama's faculty [22] athletic representative, (now head of the Committee on Infractions) and Marie Robbins (Alabama's athletic department NCAA compliance director) were not officially

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[21] [11] These sources included, but were not limited to: Fitzgerald Hill of the University of Arkansas [C.7454-59]; Phillip Fulmer, Pat Washington, and Steve Caldwell of Tennessee [C.6966-84]; David Cutcliffe and Kurt Roper of the University of Mississippi [C.7465-69]; Rip Scherer and Charlie Coe of the University of Memphis [C.6990-96,6997,7471-74]; Milton Kirk [C.7476-85]; and Tom Culpepper. [C.7183-84]

[21] [12] Gene Marsh has stated: "Had the NCAA given this information to the University of Alabama, we could have taken appropriate action to prevent any improprieties on the part of the University of Alabama or its boosters and could have prevented [Albert Means] being admitted to school and competing on our football team." [C.6950-51,7490] Marsh further stated: "Similarly, we were never given any information by the SEC office or SEC Commissioner Roy Kramer about questions concerning the recruitment of Albert Means." [C.6951,7490-91]

notified of the NCAA's investigation until November of 2000, when NCAA investigator Richard Johhaningmeier came to Tuscaloosa to interview coaches, staff, and players. [C.6950,7489-90] Cottrell and Williams were interviewed by Johhaningmeier of the NCAA that November and terminated from their coaching positions that same month after Alabama's three win and eight loss season. [C.5969,7070]

1. Culpepper's False and Defamatory Statements.

On or around December 12, 2000, Culpepper was recorded on a telephone conversation with Rodney Orr. Orr owns and operates a highly popular internet web site called *TiderInsider.com*, which follows the Alabama sports teams. In the recorded conversation, made the following statements:

- In reference to Cottrell, he stated: "And that liar is without a job now, and he's going to have damn hard time finding one. And that's all there is to it." [C.7754]

- In reference to Rodney Orr, he stated "You [Orr] have yoked yourself to a powerbase of Logan Young and Ronnie Cottrell, and they were bad people." [C.7756]

[23] - In reference to Orr, he stated, "This time last year, I begged you and I told you, I said, there are people that are going to get Logan Young out of here and there are people that are going to get Ronnie Cottrell out of here. And they're doing it. You write it down. They are doing it." [C.7757]

- In reference to Orr asking Culpepper to stop trying to ruin people, Culpepper stated, "They tried

to ruin me." Orr interjected, "But, Tom" and Culpepper cut him off by stating, "No. You slapped me, I slapped you back harder. That's how I work." [C.7759]

- In reference to Cottrell, he stated: "You're right. I wanted him out. And why did I hate him? Because he was bad for Alabama." [C.7769]

- In reference to who he told about possible violations, Culpepper stated "You know, but the people I told were either people that were in our inner circle or friends of people that were in our inner circle. They, weren't you know people that were connected to the NCAA. [C.7774]

Also, Culpepper admitted in his deposition to saying the following about Cottrell:

- Culpepper claimed that he only told his friends statements about Cottrell. These friends were "media types." Culpepper felt that those conversations were confined to his group of friends and close friends of theirs. [C.7163]

- Culpepper participated in a conference call with Mike Wood and Paul Finebaum one Saturday in August of 2000. [C.7170] Culpepper, Mike Wood and Paul Finebaum discussed rumors coming out of Memphis for a period of time less than two hours. [C.7170,7173]

- Culpepper had no knowledge as to the validity of a statement he made to Fulmer that Logan Young had helped purchase Cottrell's home. This was just a rumor that he heard and repeated to Fulmer. [C.713-32]

- Culpepper admitted that anything that he reported to Fulmer [24] regarding Ivy Williams would have simply been rumors. [C.7133]

- In reference to the Rodney Orr tape, Culpepper admitted he has told several different people on several occasions that Cottrell is a cheater, but that he has no proof of Cottrell being a cheater. [C.7155]

- Culpepper admitted that he had repeated to others a story he had heard about Cottrell allegedly abandoning his ex-wife and children in Tallahassee, and that someone had to purchase a trailer for them to live in. [C.7165]

- Culpepper admittedly repeated to Johhaningmeier a rumor that Cottrell had arranged for someone to take a fraudulent ACT test in Tallahassee, Florida. Culpepper believed it was up to Johhaningmeier to either prove or disprove it. [C.7167]

- In reference to Bruce Parrish's affidavit at paragraph 9, Culpepper agreed that he repeated a story about Cottrell allegedly having his assistant steal videos for him from the Alabama athletic offices. Culpepper admitted he had has no proof that Cottrell actually stole the videos. [C.7168-69]

- Culpepper admits to having told sports radio talk show host Paul Finebaum that Cottrell once had to go and speak with SEC Commissioner Roy Kramer for disciplinary reasons. [C.7171]

Culpepper also made defamatory statements regarding Cottrell and Williams to Mark Slaybaugh, a sportswriter for the Atlanta Journal Constitution [C.7177,7198-99], John

Longshore, a co-host of a sports radio talk show in Montgomery [C.7794-95], and Paul Finebaum, host of a radio talk show in Birmingham.[13] [C.7803-05]

[25] **2. The Conspiracy's Media Leaks During the Investigation Defame Cottrell and Williams.**

Both Cottrell and Williams were prohibited by NCAA bylaws from commenting on the NCAA investigation, and they declined comment to newspaper reporters. However, even though an NCAA bylaw requires that NCAA employees such as Johanningmeier keep the investigation confidential, he was in contact with media persons during the investigation, such as reporters Bill Lunn and Allie Golon [C.7787-88,8544-45], as well as secret witness Culpepper, who admitted sharing information with other persons in the media. [C.7774-77] During the investigation, information which Cottrell shared with Johanningmeier during interviews subsequently appeared in newspaper reports. Cottrell was first interviewed by Johanningmeier on November 28, 2000. [C.3716-33] In that interview he

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[24] [13] Additionally, Culpepper made many defamatory statements regarding Cottrell and Williams to Terry Harrington, an acquaintance of Culpepper's who was the administrator of a private, invitation-only internet message board for fans of Alabama called Tidal Surge. [C.8016] Culpepper told Harrington that Cottrell tried to steal videotapes of Alabama football recruits from the Alabama football complex and had gotten a "ringer" to take a college admissions test for a football recruit. [C.8016] He also told Harrington that both Cottrell and Williams were involved with Logan Young in the payment of money to football recruit Albert Means. [C.8016] Culpepper also made defamatory statements regarding Cottrell in 2001 on the Tidal Surge internet message board. [C.8013-30]

provided information regarding use of a certain prep school by football players who later signed scholarships with Alabama. That information was the topic of a Birmingham News article in February 2002, which portrayed Cottrell as have acted wrongfully.

[26] Cottrell gave the NCAA a second interview in May 2001, in which he answered questions surrounding his personal real estate dealings. [C.3716-33] Not even one month later, this information was the topic of an article on the front page of *The Tuscaloosa News*. [C.7840-42] Again, this article portrayed Cottrell as having acted wrongfully.

Similarly, there was a leak of confidential information obtained by the NCAA during the investigation regarding Williams, where *The Tuscaloosa News* somehow knew to seek the telephone records showing Williams' contact with Logan Young in the months leading to the February "signing day" for football players when Albert Means signed scholarship papers with Alabama. [C.7830-33] Other news articles published during the period of the investigation contained references to information that had indicated a source within the investigation. [C.7835-38,7844-45,4847-49,7851-53,7855-57]

D. The Conspiracy Succeeds in Damaging the Alabama Football Program and Cottrell and Williams.

On February 1, 2002, Tom Yeager, Chairman of the NCAA Committee on Infractions, announced the penalties leveled against Alabama for its rules violations. Alabama was given severe sanctions and nearly received the death penalty, as evident from Yeager's comment that "Alabama

was staring down the barrel of a gun." [C.7859]. However, neither Cottrell nor Williams were found guilty of an major NCAA rules [27] violations. [C.6956] Despite not finding Cottrell or Williams guilty of any significant violations, the NCAA's "News Release" stated:

> that "the committee considered imposing a show cause order on one of the former Alabama assistant coaches but decided not to do so because he was terminated by the university at the conclusion of the 2000 season **and since that time has been out of college coaching, under what the committee considered to be a *de facto* show-cause order."**

[C.7870] (emphasis added).

In conjunction with the NCAA's infractions report, the NCAA issued a summary of its findings on its website, *www.ncaa.org*. [C.7873]. In the summary of its Report on Infractions for Alabama, the NCAA falsely stated in its "Penalty Summary" that one of the sanctions was a "show-cause provision for a period of eight years for the former recruiting coordinator." [C.7873-77] This comment was plainly directed at Cottrell, who had been Alabama's recruiting coordinator. [C.5972,8009] However, the statement was completely false, as no show-cause provision was ever issued to Cottrell. [C.7873-77] The NCAA did *not* correct this defamatory statement until about October 2003, some 18 months later. [C.7879-81,5972]

Additionally, the Penalty Summary contained a section where the NCAA marks "YES" or "NO" on the form to indicate whether employees of the University of Alabama were issued "show-cause provisions," and the NCAA checked "YES." [C.7879-81,5972,7071] This statement *falsely* indicated that

Cottrell and Williams, the only employees against whom [28] any allegations were formally made in the infractions process, had been issued "show-cause provisions."

1. Cottrell and Williams Suffer Injury.

a. Cottrell's Injury.

Immediately upon losing his coaching position at Alabama, Cottrell immediately began searching for his next coaching job. Cottrell contacted several prominent college football program head coaches and was told by each that he could not be hired because of his involvement with the NCAA investigation of Alabama. [C.5970-71] Cottrell has even been told that he needed to make his career outside of college football. [C.5973] In fact, it was only in 2005 that Cottrell was able to be hired as a football coach, and then only as head coach at a small high school in Ozark, Alabama. [C.5974] Cottrell has also suffered great emotional distress as a result of the actions of the Defendants, which have destroyed his college football coaching career. [C.5974]

b. Williams' Injury.

Not long after losing his coaching position at Alabama, Williams began searching for his next coaching job. [C.7070] Williams obtained an agreement to become the head football coach at Miles College; however, that offer was rescinded when the Miles athletic director learned of the NCAA investigation of Alabama. [C.7070,7994-95] Williams has since been unable to obtain any coaching position with a [29] Division I-A football team and was only able to obtain an assistant coaching position with a small college in Savannah, Georgia. [C.7072]

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E. Facts Relevant to Issue of "Public/Private Figure" Status.

The Defendants had the burden of proof to establish that Cottrell and Williams were public figures or, as defendants contended, at least "limited purpose" public figures. The evidence which the Defendants presented on this issue was first a set of newspaper and other media articles mentioning Cottrell and/or Williams during the time period of 1997 through 2001, which were exhibits filed with their summary judgment motion. [C.5782-5847,5848-5909] However, only one day before the hearing on their motion, the NCAA Defendants filed copies of additional articles (many illegible) regarding Cottrell and Williams [C.11375-11824], which Plaintiffs counsel obviously did not have time to read or respond to and should not have been considered by the court pursuant to Rule 56, Ala.R.Civ.P. The NCAA sought to show that the Plaintiffs had media access and had public notoriety.

However, absent from these articles is any evidence that either Cottrell or Williams was a politician, an elected or appointed officeholder, a sports star, head coach of a college or professional sports team, that they appeared on a recurring radio or television show, or that they were allowed to give press conferences for the University of Alabama. [C.5967-68,7069-70] The vast majority of the [30] articles submitted by the NCAA simply involve news coverage of Alabama football where mention of Cottrell or Williams is incidental, as opposed to articles where they are the focus. The Plaintiffs also presented affidavit testimony of radio sports commentators John Longshore of Montgomery, and Paul Finebaum of Birmingham, who stated that while fans of Alabama football would be

familiar with the head coach and players, but not assistant coaches. [C.8800-8804,12002-06] Additionally, in deposition testimony that the circuit court failed to consider, Shep Cooper of the NCAA testified that college coaches outside the state Alabama would not know Cottrell had been the recruiting coordinator at Alabama. *See* Exhibit 1.

1. The NCAA "Gag Order."

NCAA Bylaw 32.1.4 requires that all parties involved in an investigation keep it confidential. [C.5579] When Cottrell was interviewed by Johhaningmeier [sic] of the NCAA in November 2000, and again thereafter, he was instructed he could *not* speak to the media or anyone else regarding any matters pertaining to the investigation and his failure to comply with this instruction could result in an unethical conduct charge being imposed upon him by the NCAA. [C.5971-72] Consistent with this admonition from the NCAA, even after the stories and rumors about the investigation began surfacing, Cottrell and Williams consistently declined to give any interviews or statements and [31] thus did not interject themselves into a public controversy.[14]

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[31] [14] The Plaintiffs declined to make statements or discuss the NCAA investigation, as reported in a number of the articles offered by the Defendants, including articles on December 31, 2000, January 11, 2001, February 22, 2001, February 23, 2001, June 1, 2001, August 12,2001, and November 18,2001. [C.5783-5947].

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III. STATEMENT OF FACTS ALLOWED BY THE COURT TO BE PRESENTED AT TRIAL.

Because the circuit court granted summary judgment to the Defendants on the Plaintiffs' claims relating to the conspiracy media leaks, evidence of the conspiracy was *not* allowed to be presented to the jury at trial, and thus many of the facts noted above were *not* presented at trial.

A. Coaches Cottrell and Williams.

At trial the jury learned about Cottrell's and Williams' coaching careers leading up to being hired by Alabama [R.1785-99,2112-13,2116-17] When they were let go from the Alabama coaching staff at the end of the 2000 season, Cottrell's salary in was $120,000 [R.2119,2122], and Williams' was $109,000.

B. Culpepper.

During that same time period when Cottrell was the recruiting coordinator at Alabama, Culpepper was a college football recruiting analyst and commentator who had several employers such as *Rivals.com*; College Sports Southeast, a regional cable television network; and Tide Talk, a radio program. [R.1120,1127-29] As a result of the nature of his employment, Culpepper had certain access to the Alabama athletic [32] department. [R.1129-31]

At first, Cottrell's relationship with Culpepper was cordial, but it did not remain so. [R.2145] It began to sour in 1998 when head football coach Mike Dubose directed Cottrell to limit the access of recruiting analysts to the Alabama football offices, where they had previously had

free run. [R.2146-47,2401,2403] Culpepper complained that he had more access to the coaches at other universities, and felt he was being treated unfairly. [R.2147-48,2406,3009] By 2000, the relationship between Cottrell and Culpepper had deteriorated and Cottrell learned that Culpepper was spreading rumors about him.[15]

C. Statements Made by Culpepper Which are Not Actionable (Due to the Statute of Limitations) But are Evidence of Malice.

1. Culpepper's Desire to End Cottrell's Career.

Culpepper openly admitted at trial that he repeatedly expressed to people that Ronnie Cottrell was a "cheater" and that he wanted the NCAA to end Cottrell's coaching career. [R.3124,3129] At trial, many witnesses testified to such facts:

Rodney Orr, the owner of Tider Insider, an internet web site devoted to Alabama sports, testified at trial that when he and [33] Culpepper occasionally spoke, Culpepper complained that his access to offices and coaches of the Alabama football program was much less than at other universities, and that Culpepper blamed Cottrell for denying him such access. [C.1292,1294-96]

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[32] [15] In October 2000, Cottrell had a meeting with Culpepper and several other persons in which he explained to Culpepper his concern over the defamatory statements that Culpepper was making about him, such as that Cottrell was a cheater violating rules in recruiting, but Culpepper was not deterred and did not stop. [R.2148-50,2156-58,3008-09,3017,3025-26]

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Bruce Parris, a recruiting analyst and sports talk radio host who at one time considered going into business with Culpepper, testified at trial that early in 2000, Culpepper told him that Cottrell was involved with Logan Young in "buying players" for the University of Alabama. [R.1588,1592, 1599,1603] He further testified that Culpepper had told him that Ronnie was "dirty" and "cheating" and that it had to be stopped. [R.1599,1603]

Reginald Willis, a one-time friend of Culpepper, testified at trial that during 2000 Culpepper told him repeatedly that Cottrell was a "liar and a cheater," "a cancer to the program," and that he and Logan Young had to be removed. [R.1466,1472-73]

Freddie Kirby, a football recruiting analyst testified that during the Fall of 2000, Culpepper told him that Cottrell shouldn't be recruiting coordinator at Alabama and that he, Culpepper, would see to it that Cottrell would not coach at Alabama or anywhere ever again. [R.1577-78] Kirby further testified that Culpepper had told him that Cottrell had stolen money from the Shaun Alexander Fund, and had stolen videotapes of recruits from the Alabama football offices. [R.1577]

Clark Branch, who worked in the same building as Culpepper during 2000 to 2002 testified that he and Culpepper had had several conversations where Culpepper [34] had expressed a desire to see Cottrell fired from the Alabama football program, whatever it took. [R.1441-42]

Forrest Davis, a football recruiting [sic] testified that Culpepper had told him that "Cottrell had embezzled money from the Shaun Alexander Golf Tournament and the reason he did it was because he had a gambling habit

and that the gambling habit was probably funded by Logan Young." [R.1728] Davis also testified that Culpepper had told him that "Ivy Williams was paying players" such as Albert Means. [R.1728-29] Davis testified that he'd had a second conversation with Culpepper some months later after Cottrell was no longer a coach at Alabama where Culpepper had told him that Cottrell had stolen recruiting videotapes from the Alabama football offices. [R.1730-31]

Bruce Graham, a writer who worked for various college sports media publications, testified at trial that in July 2000, Culpepper told him that he was on a mission from God to get Cottrell and Young out of the Alabama football program even if it meant taking the program down with them and that he was going to get them for what they had done to Randy Ross, the coach who had preceded Cottrell as the recruiting coordinator. [R.1400-02,1419-20] He told Graham that he was going to end Cottrell's career. [R.1420] Graham further testified that in other [35] conversations Culpepper had told him that Logan Young had paid money to Cottrell to get Cottrell to leave his position at Florida State, and that he would do whatever it took to end Cottrell's career. [R.1422-23]

Paul Finebaum, a sports radio talk show host, sports-writer, and television sports commentator testified about a telephone conversation he had had with Culpepper late in the Summer of 2000. [R.144-46,1649] Finebaum testified that the telephone call from Culpepper occurred shortly after Finebaum had met with Tennessee football coach Phillip Fulmer in late July or August. [R.1665] Finebaum testified that Culpepper stated "a long laundry list of allegations concerning the University of Alabama football program but primarily concerning Ronnie Cottrell and a

number of shenanigans that Mr. Culpepper said he was doing in bringing down the football program and in endangering the football program and disgracing the football program." [R.1650-51] Finebaum testified that Culpepper has told him that Ronnie Cottrell was involved with Logan Young in giving money to football recruits and was a cheater. [R.1651,1665-66] He further testified that Culpepper had told him "something about Cottrell leaving his family," and that a financial connection existed between Cottrell and Logan Young. [R.1666] Finebaum testified that Culpepper had also made statements to him during the conversation regarding Ivy Williams, such as that Coach Williams was a "dirty coach" who broke NCAA rules. [R.1674] Finally, [36] Finebaum testified that he had repeated on his radio show many of the statements that Culpepper had told him. [R.1652]

2. Culpepper's Involvement with the NCAA.

In August 2000, Culpepper met with Fulmer and Fulmer's private attorney in Chattanooga, Tennessee, and discussed what Culpepper said he had been told by Young regarding things that would be NCAA recruiting violations while on an automobile trip. [R.1147,1151,1153-54] Just a few days later, Culpepper was contacted by Defendant Johanningmeier of the NCAA, who he then met with. [R.1154-56,1160,1275] At trial, Culpepper admitted that in the August 2000 meeting with Johanningmeier, Culpepper [36] made several false and defamatory statements about Cottrell, some of which would have been NCAA rules violations:

- **that Cottrell used a person in Tallahassee, Florida who administered college admission tests and for a fee ensured that a prospective student-athlete received a passing score;**
- **that Alabama booster Young had given Cottrell cash to purchase a residence in Tuscaloosa, Alabama;**
- **that Young had given Cottrell additional money for gambling;**
- **that Cottrell had divorced his first wife in order to marry a wealthy woman and had abandoned his ex-wife and children;**
- **that Cottrell had improperly received payment for the use of his name on a charity golf tournament; and**
- **that Cottrell had leaked the story to the media that Alabama's head football coach Mike Dubose was involved in a sexual harassment lawsuit with a former employer of the athletic department.**

[37] [R.1163,1168-74; Pl. Trial Exh. 3-5,88,88A][16] Culpepper further told Johanningmeier that the NCAA should not allow Cottrell to ever coach again. [R.3101] Culpepper also met with Johanningmeier in January and April 2001, and they had additional telephone conversations. [R.1274-77; PTE 91,91A,91B,92,92A]

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[37] [16] Culpepper also met with NCAA representative Defendant Johanningmeier in January and April 2001, and had additional telephone conversations. [R.1274-77; Pl. Trial Exh. 91,91A,91B,92,92A]

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In November 2000, the NCAA finally gave notification to the University of Alabama that it had begun an investigation of potential rules violations. [R.2975-76] Culpepper then met with Gene Marsh, the faculty athletic representative to the Alabama athletic department, in January 2001, in a meeting set up by Johhaningmeier. [R.2776,2874] Even though Culpepper had assisted the NCAA's investigation of Alabama, he subsequently denied that he had spoken to NCAA representatives. [R.3063] However, his statements were used by the NCAA to support the NCAA's Report on Infractions against Alabama [R.3062-63], which ultimately resulted in Cottrell and Williams suffering injury.

3. Additional Evidence of Malice by Culpepper.

Plaintiffs Cottrell and Williams, as well as Head Coach Dubose and all the coaches of the Alabama football team were fired in November 2000, following the three-win and eight-loss season. About December [38] 12, 2000, Culpepper made a lengthy telephone call to *Rodney Orr* (who is noted above), a large portion of which was recorded by Orr. [R.1224,1292,1298-1300; Pl. Trial Exh. 93B] Culpepper and Orr were acquainted based upon their work in their media work. [R.1294] In the call to Orr, Culpepper made many threatening and defamatory statements regarding Cottrell and admitted that he had "bashed" Cottrell in speaking to a lot of other media people. [R.1247-48,1300, 1361; PTE 93B]. It is unquestioned that during the call, Culpepper referred to Cottrell as "liar," "a fucking cheater," "a person with no character and no integrity," and a "bad [person]." Culpepper further

stated that Cottrell "slapped me, and now he's getting slapped back." Culpepper admitted that he hated Cottrell and that he "wanted him out." [Pl. Trial Exh. 93B]

D. Actionable (Post-December 20, 2000) Defamatory Statements by Culpepper.

There was evidence presented at trial that Culpepper made defamatory statements about Cottrell *after* December 20, 2000, which were, thus, within the statute of limitations period.

Terrance Harrington is the creator of a private Alabama sports internet message board site called Tidal Surge. [R.1366-67,1374-75] The membership of Tidal Surge included important alumni of Alabama involved in the media, including Warren St. John, a writer for the New York Times newspaper, and Reece Davis, a commentator for ESPN, the [39] leading television sports network. [R.1375] Information posted on Tidal Surge was sometimes picked up by the news media. [R.1509] Culpepper became a good friend to Harrington and occasionally shared information with Harrington and posted messages on Tidal Surge [R.1493] **Harrington testified that after December 20, 2000 Culpepper told him derogatory and horrible things about both Ronnie Cottrell and Ivy Williams and that he, Harrington, believed and would often republish those statements to others.** [R.1494,1496-97,1510,1512] He testified that Culpepper had told him in 2001 that Williams was responsible for funneling money from Logan Young to the Memphis, Tennessee high school football player Albert Means. [R.1512] Harrington further testified that Culpepper had continuously used the word "cheater" when referring to

Cottrell, and had stated that Cottrell "didn't deserve to breathe the same air as good Alabama people." [R.1512] He also testified that Culpepper had told him that Cottrell and Williams needed to be branded as cheaters and that they should never again coach in Division I college football. [R.1513] **Additionally, Harrington demonstrated that during 2001 and later Culpepper posted messages on Tidal Surge that both Cottrell and Williams were "cheaters" and that the "NCAA let [Alabama] slide on two of the allegations involving Ivy Williams and Ronnie Cottrell in order to honor their confidentiality agreements" with witnesses, and made other defamatory statements about Cottrell and Williams.** [R.1503,1510]

[40] Harrington testified that Culpepper had made the following defamatory statements about Cottrell:

- **that Cottrell had abandoned his family in Florida when moving to Tuscaloosa to coach at Alabama;**
- **that Cottrell had stolen money from a charity golf tournament;**
- **that Cottrell and his graduate student assistant had been caught by campus police stealing videotapes of potential football recruits from the Alabama football program offices; and**
- **that Cottrell had helped provide money to football players.**

[R.1495,1497] Harrington also testified that Culpepper had made the following defamatory statement about Williams:

- **that Williams was one of the persons who Logan Young used to provide money to Albert Means.**

[R.1512]

Harrington testified that he had believed what Culpepper had told him and that he had repeated the statements to others. [R.1494,1496,1513]

Bruce Parris testified at trial that at the SEC Media Days in July 2001, that Culpepper had made the following defamatory statements about Cottrell:

- **that Cottrell had "embezzled money from the Shaun Alexander Foundation in order to pay off gambling debts;"**

[41] • **that Cottrell "had abandoned his children in Tallahassee to come to Tuscaloosa;" and**

- **that Cottrell "had been caught stealing [video]tapes from the [University of Alabama] athletic department in the middle of the night."**

[R.1604-05]

Charles Branch further testified at trial that sometime in 2001 he spoke with Culpepper and that Culpepper had been very boastful that he was "still standing" and that Cottrell was not, and that Cottrell was a liar and a cheater. [R.1473-74,1487]

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E. Actionable Defamatory Statements by the NCAA.

In February 2001, the University of Alabama received a preliminary Letter of Inquiry ("LOI") from the NCAA relating to the recruitment of Albert Means, who had enrolled at Alabama in August 2000, and other alleged recruiting violations. [R.1801] The only Alabama football coaches who were named in the LOI were Cottrell and Williams.[17] [R.1778]

The Letter brought two allegations against Williams regarding the recruitment of Albert Means to attend college at Alabama. [R.1802-04] A third allegation against Williams involved a greater number of visits to a high school in 1999 and 2000 than allowed by NCAA regulations, [42] which was merely a "secondary violation."[18] [R.1804-05] Williams contested the first two allegations, but admitted the third. [R.1805]

On February 1, 2002, the NCAA released its Public Infractions Report against Alabama. [R.2594] The defamation claims of Ronnie Cottrell and Ivy Williams against the NCAA are based upon statements present in the NCAA's Penalty Summary of its report found on its internet web site, which was openly available to the public, other college football coaches, and potential employers of the Plaintiffs. [R.2592-94]

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[41] [17] Because the court granted summary judgment to the NCAA on Cottrell's claims against it, there was little evidence presented at trial in relation to the defamatory statements made by the NCAA relating to Cottrell.

[42] [18] Secondary violations of NCAA regulations are common among college football coaches, and generally do *not* adversely affect the coach's career. [R.1808]

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The "Penalty Summary" included a *materially false statement* that there was a "show cause provision for a period of eight years for the former recruiting coordinator" of Alabama. [R.2594,2608-09; Pl. Trial Exh. 16] As noted previously, Ronnie Cottrell was the recruiting coordinator for Alabama. **In addition, in a related section containing the designation of either "YES" or "NO" to indicate whether employees of Alabama has been issued "show cause provisions," *the NCAA checked "YES," indicating to the reader that the NCAA had placed "show cause provisions" on "employees" of Alabama.*** [Pl. Trial Exh. 16; R.1776-77,1779-80,1871-72,1874-75,2596] Cottrell and Williams were the only employees of Alabama who had been named in the NCAA Letter of Inquiry against the University of Alabama, and they believed that the [43] reference to "employees" was plainly a reference to them. [R.1178,1875,1877,2055,2057,2102] A "show cause provision" placed on a college football coach by the NCAA indicates that for a period of eight years the coach could not be hired by NCAA member institution unless the institution could show cause for why they should be hired. [R.1877]

However, these public assertions were admittedly *false*, because the NCAA had, in fact, *not* placed show cause provisions on either Cottrell or Williams. [R.1775,1777,1781,2594,2596] **The NCAA attempted to excuse the two false entries as having been made by an NCAA employee entering the information of the NCAA web site, who claimed she used the Penalty Summary for an Infractions report against the University of Kentucky issued the day prior, where show cause provisions had been issued,**

as a basis to prepare the Summary for Alabama. [R.2596,2619-21,2625-31,2636-37,2669-70] However, contrary to the self-serving impression the NCAA attempted to convey, that this was a one-time slip-up that was corrected, the actual facts established in the DeWees and Cooper depositions show a long-term failure to correct the false statements.

The NCAA did *not* correct the first of the two false statements, that the recruiting coordinator at Alabama had a show cause provision placed on him, until October 2003, more than a-year-and-a-half later. [R.2602-03] The misstatement was not corrected in September 2003, when [44] an NCAA employee went back into the internet web page to enter the information that the penalties against Alabama had been upheld on appeal. [R.2598-99] In fact, the NCAA employee, who went into that particular web site numerous times manually to make changes, did not remove the false statements on at least the following occasions: shortly after September 17, 2003; October 9, 2003, October 12, 2003; and October 13, 2003. [C.12611-12,12621] **That first false statement entered in the publicly-available Penalty Summary was permitted to continue without review for corrections needing to be made, even though over three-hundred persons work at the NCAA offices in Indianapolis.** [R.2599,2673-74] The NCAA admits that it has no way to know how many times that false information was viewed on the web site (i.e., how many "hits" the web page had) over the twenty months the false statement was in existence before it was deleted. [R.2603] **Moreover, even after the October 2003 correction of the first false statement was made, the second false statement regarding show cause provisions on "employees,"**

indicating Cottrell and Williams, remained *uncorrected for another whole year.* [R.2604]

In the case of the second false statement, the NCAA employee, who went into that particular web site many times to make changes, beyond not making any corrections on any date from February 1, 2002 through August 2003, did not remove the second false statement on at least the [45] following occasions: any date from February 1, 2002 through August 2003; shortly after September 17, 2003; October 9, 2003; October 12, 2003; October 13, 2003; October 14, 2003; nor any occasion after October 14, 2003 for the next year. [C.12611-12;12621] **It was not until *another* year after the foregoing, or by now more than two-and-a-half years from the initial publication, that in October 2004 the NCAA finally corrected its false statement, that "employees" of Alabama had had show cause provisions placed on them.** [R.2604-05] The NCAA also admits that it does *not* know how times this publicly available false information was viewed. [R.2603]

The NCAA did *not* take any affirmative action to inform its member institutions, potential employers of Cottrell and Williams, that it had published false information about them even though it routinely communicates with the institutions by mail [R.2679-80], **but merely posted a brief notice about the false statements on the web page at issue for a tiny amount of time, one or two days following the correction made in October 2003.** [R.2677]

F. Evidence that the Defamatory Statements Made by Culpepper and the NCAA are False.

As noted above, one of the statements made by Culpepper regarding Cottrell was that he had stolen money from a charity golf tournament that he had been associated with. This statement was shown to be false by the trial testimony of Eugene Ezell of Choctaw County, Alabama, who [46] is president of the local chapter of the University of Alabama Alumni Association. [R.1545-46] Ezell testified that the Choctaw County chapter's main fundraiser is a charity golf tournament, and that Cottrell had been associated with the tournament, but had actually contributed money to the chapter rather than stolen or been given any. [R.1546-47]

One of the other defamatory statements made by Culpepper is that Cottrell abandoned his children when he moved from Tallahassee to Tuscaloosa in 1997 and that they had to be taken care of by others. That is *not* true. [R.2118,2159] Culpepper admitted that he had no first-hand knowledge on the subject and was simply repeating something he had been told by someone else. [R.3066] When Cottrell took the coaching position with Alabama in December 1997 he moved his wife remained in Tallahassee because his son was a high school senior who would be graduating in the spring. [R.2125] His wife and children then moved to Tuscaloosa to live with him. [R.2125,2159]

Another defamatory statement by Culpepper regarding Cottrell is that Cottrell embezzled money from the Shaun Alexander Foundation. Culpepper did not substantiate this allegation, and Cottrell did *not* take such action. [R.2159] He also did not take money from the charity golf

tournament of the Choctaw County University of Alabama alumni group. [R.2160]

[47] Yet another defamatory statement by Culpepper regarding Cottrell is that Cottrell stole recruiting videotapes tapes from the Alabama football offices. This is not true, as the videotapes in question had merely been relocated within the athletic department. [R.1679] Culpepper admitted that he was repeating something he had been told by someone else. [R.3067]

The NCAA made two allegations against Coach Williams relating to the recruitment of Albert Means, which Williams contested. [R.1810-11] Williams denied having any knowledge of monetary payments made to secure the commitment of Albert Means to attend Alabama. [R.1810-11] **On November 6, 2001, Williams' attorney received a letter from the NCAA indicating that it had dropped the two allegations relating to Means which Williams had contested.** [R.1813-16; Pl. Trial Exh. 485] While the Penalty Summary placed on the NCAA's internet web site following its release of its Public Infraction Report relating to the University of Alabama in February 2002 contained a reference indicating the "employees" of Alabama had show cause provisions placed on them, that information was *false* and was eventually removed. [R.1871-83]

G. Evidence of Cottrell and Williams' Inability to Respond to Defamatory Statements Due to the "Gag Order" Imposed by the NCAA During its Investigation.

During the period of the NCAA investigation, both Cottrell and Williams were prevented by NCAA Bylaw

32.1.4 from responding fully in [48] the media to the negative publicity that was occurring in regard to them, which is the "gag order" of the NCAA. [C.3267-68,4358,4360] They had both been specifically instructed by Johanningmeier in their investigation interviews not to speak to members of the media regarding the investigation. [C.3250-51,4358-59,5938] This prevented them from attempting to clear their name at a highly critical time – before their reputations were inexorably damaged. [R.2290,2294]

H. Evidence as to the Public/Private Figure Status of Cottrell and Williams.

The Defendants bore the burden of proof at trial to demonstrate that Cottrell and Williams were public figures or, as the Defendants contended, "limited purpose" public figures. One of the Defendants' contentions was that Cottrell had such notoriety that a charity golf tournament had been named after him. However, at trial, that assertion proved to be *false*.[19] The Defendants relied upon the status of the Plaintiffs as former assistant football coaches at Alabama, and other evidence in the form of newspaper and other media publications in which they were mentioned or discussed, including some articles which specifically related to the controversy that was at issue at trial, as well as the lawsuit itself. [Culpepper Trial

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[48] [19] Eugene Ezell, of the Choctaw County chapter of the Alabama alumni association testified that their golf tournament was *never* called the "Ronnie Cottrell Charity Golf Tournament," and was never named after him. [R.1548-49,1551]

Exh. 64A,64B,64C,64D,66B, [49] 66C,66D,66E; NCAA Trial Exh. 245A,246,251,252,253,258]

I. Evidence of Injury Suffered by Cottrell and Williams.

1. Emotional Distress Suffered by Cottrell and Williams.

a. Ronnie Cottrell.

Cottrell suffered great emotional distress as a result of his reputation as a top recruiting coordinator and assistant coach being irreparably damaged at least in part due to the actions of Culpepper and the NCAA. [R.2181] He suffered great stress over losing his career as a college football coach and his dream of one day being a head football coach. [R.2181] Cottrell's inability to continue his coaching career at the Division I college level is the worst thing that has ever happened to he and his family, and it has created a great financial hardship and stress in his marriage. [R.2181-82,2479] Cottrell has had to accept money from family members, and he had found it to be the "worst feeling" to be dependent on others. [R.2182] The stress has caused him to be unable to sleep and it has caused him to have to undergo medical treatment and to take several prescription medications which he did not take previously. [R.2182,2185-87,2478-79]

b. Ivy Williams.

Williams has suffered great emotional distress as a result of his reputation as one of the top assistant coaches in college football being "severely damaged," causing him to be unable to find employment [50] as a Division I football coach. [R.1910-11] Williams inability to find any

employment for a period of time, and then only employment at a much lower salary caused him to suffer stress over financial issues. [R.1911] He has worried about possibly having his home foreclosed upon, about being unable to pay for his children's college education, and about his wife having to find employment. [R.1911,2486] He and his wife had to sell their home and move into an apartment. [R.2489] It has left him disheartened, depressed, and lifeless. [R.2485-86]

2. Evidence of the Inability of Cottrell and Williams to Find Employment as Division I-A College Football Coaches.

The entire coaching staff of the Alabama football team was fired from their jobs following the final game of the 2000 season. [R.1819] At that time, Cottrell's salary was $120,000 annually [R.2122], and Williams salary was $109,000 annually [R.1830]

a. Coach Cottrell's Search for a Coaching Job.

After being let go from the Alabama coaching staff, Cottrell began seeking other college football coaching positions. [R.2172] He believed in January 2001 that he was going to be offered a position as an assistant coach at the University of Georgia, but he was not offered that position. [R.2173-74] Cottrell had obtained a sports agent while coaching at Alabama and his agent, Jimmy Sexton, also sought employment for him. [R.2174-75]

[51] Cottrell began working in August 2001 as a salesman of long distance calling and other telephone

services where his gross salary from commissions, from which travel and other expenses were deducted, was about half of his prior salary. [R.2166] He was also hired to be a radio commentator for a syndicated program on college football, but was let go before he ever did a show. [R.2169-70; C.3781] Cottrell also took a substitute teaching job at a high school. [R.2171] Although he sought after many college football coaching jobs [R.2176-79], he did not work as a coach until in 2005 when he was hired as the head football coach at Carroll High School in Ozark, Alabama, at a salary of $53,000.

b. Coach Williams' Search for a Coaching Job.

After being let go from Alabama coaching staff, Williams began a search for employment and hoped to find a head coach or assistant coaching position. [R.1819-20] The NCAA allegations against Alabama and Williams cast a cloud over his employment search, even though no allegation had been proven. [R.1820] Prior to the defamatory statements made by the NCAA and Culpepper against Coach Williams, he had never been denied any coaching position that he had sought. [R.1801] In January 2001, Williams was hired to be the head football coach at Miles College for an annual salary of $70,000; however, the contract was rescinded shortly thereafter. [R.1822,1950-51]

[52] Thereafter, Williams applied for assistant football coaching jobs at numerous universities, but was not hired. [R.1823,1830,1833] Williams continued to seek employment as a college football coach after the NCAA's Public Infractions Report against Alabama was released in

February 2002. [R.1834-35] After the allegations against him were withdrawn by the NCAA in November 2001, Williams was advised by an NCAA representative, that since the case was still open he was required to send with his resume a letter indicating the same to his prospective employers. [R.1839-40,2095,2100] He then sought employment with many colleges but was not hired. [R.1835-39,1846,1850,2014-30,2034-35] Williams was eventually hired as an assistant coach by the Savannah State University, a Division I-AA football program, in August 2002, at a salary of $46,000 annually.[20] [R.1851,1855]

II. POST-TRIAL EVIDENCE OF THE INDEMNIFICATION AND HOLD HARMLESS AGREEMENT BETWEEN CULPEPPER AND THE NCAA.

A. The Written Settlement Agreement.

As a part of the discovery in this case, Plaintiffs' counsel traveled to Indianapolis, Indiana in February 2005 to depose the NCAA [53] personnel, including President Myles Brand. During the deposition, Plaintiffs' counsel asked Brand, "Has the NCAA paid any legal fees on behalf of Tom Culpepper?" Brand answered, "Not to my knowledge." [C.7706-07]

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[52] [20] Williams was still employed by Savannah State at the time of trial in 2005, at the salary of $46,700. [R.1861] He has continued to seek employment as a football coach in Division I-A college football, but has not been hired. [R.1862,1866,1870,1888,2030-31] Williams also looked for employment as a coach in the NFL, but was also unsuccessful. [R.1891-2] He is currently employed as an assistant coach at Carroll High School in Ozark, Alabama, where Cottrell is the head coach.

However, on March 17, 2005, a month after Brand's deposition, Plaintiffs' counsel received a letter from the NCAA, stating that it had entered into a settlement agreement with Culpepper on November 15, 2004. [C.7979-80] The letter also stated that Brand would correct his deposition testimony in the near future. [C.7979-80] On April 22, 2005, Plaintiffs received Brand's deposition correction [C.7988-90], which contained an explanation that read a follows:

> "At the time I gave my answer to this question, I was not aware of a settlement agreement between the NCAA and Tom Culpepper in which Mr. Culpepper agreed to release any possible claims he had against the NCAA in exchange for the NCAA's agreement to pay for his counsel fees in connection with this case. ***After the deposition, I learned about the settlement agreement with Mr. Culpepper***. Although I had no role in or knowledge of the decision to enter into that settlement agreement, the existence of the agreement renders my previous answer on pages 31-32 of this deposition incorrect. Therefore, in order to set the record straight, I need to change the answer on page 32 line 2 from '[N]ot to my knowledge' to '[Y]es.'" [C.7990]

However Brand's sworn statement that he learned of the settlement agreement *after* his deposition was completed, is contradicted by the sworn testimony of Elsa Cole, the NCAA General Counsel in a post-judgment deposition. Cole testified that Brand had actually learned of the agreement *during a break in his deposition.*

[54] Q: When did you first tell Dr. Brand about the settlement agreement that was entered into in this case?

A: ***At the time of his deposition, during a break in the deposition.***

Q: Had he already answered the question that he was asked about the agreement before you told him about it?

A: *That, I can't recall.*

[C.13695-96] (emphasis added). Thus, Cole's testimony demonstrates that Brand had the opportunity to correct his testimony at the time of the deposition, but did not, and waited two months to do so.

The written settlement agreement that Culpepper and the NCAA entered into in November 2004 was styled "Agreement and Waiver and Release of Claims" which provided certain rights of indemnification for attorney fees and against any judgment against Culpepper rendered in this or other litigation. [C.13758-62; R.3506-09,3512] With regard to attorney fees, the Agreement states, in pertinent part:

> 1. NCAA agrees to pay Culpepper a sum of money . . . which will equal the total amount of his attorneys' fees and expenses which he has agreed to pay and is paying . . . and which have been and in the future incurred in his defense in any litigation . . . which arises out of and is based to any extent on Culpepper's involvement as a confidential source in the above-referenced football infractions case, until the conclusion of or his dismissal from such litigation. . . .

[C.13759] The NCAA has paid the attorney fees and expenses incurred by Culpepper in this litigation. [R.3512-13] Additionally, the Agreement contains the following *indemnity* provision:

> [55] 2. NCAA further agrees to ***indemnify*** and hold harmless Culpepper for any and all judgments which may be rendered against him in any litigation **to the extent that such judgment is based *in whole or in part* on Culpepper's providing information to and involvement as a confidential witness for the NCAA** in the investigation of the above-referenced football infractions case.

[C.13760] (emphasis added).

In his post-judgment deposition, Culpepper testified that at the time that he entered into the settlement agreement with the NCAA, he believed that the indemnity provision of that agreement *would* cover any judgment entered against him in this litigation. [C.14006] Additionally, NCAA General Counsel Elsa Cole testified in her deposition that she could not state whether or not the indemnity provision covered the judgment against Culpepper because the interpretation of the provision was *determined by the facts*, and that she was not familiar with the facts of the case. [C.13701-08]

B. The Earlier Oral Settlement Agreement.

The written settlement agreement between Culpepper and the NCAA does not stand alone, because additional facts came to light regarding an earlier oral agreement between them. However, the existence of this oral agreement

between Culpepper and the NCAA was actually *denied* by Culpepper's counsel when asked about such a possibility by the court *during trial*. [R.870-76]

> **Court:** Well your question in the deposition, was there any agreement –
>
> [56] **Mr. Gallion:** But you could have an oral agreement. I didn't say a written agreement.
>
> **Court**: Well, ***Mr. Scott, was there any oral agreement***?
>
> **Mr. Scott**: ***"Well, no, Your Honor***. Again Mr. Culpepper testified to the issue of who was paying his fees at that time and whether he was responsible at that time to pay his fees, and he was responsible for paying his fees in October.
>
> * * *
>
> **Court**: "Okay. Well, ***I am going to have to go with counsel as an officer of the Court's representations to the Court and I am going to stand with my ruling.***" [R. 875-76]

[R.873-74,876] (emphasis added). Thus, the existence of the *oral* settlement agreement would not have ever been brought to the attention of the Plaintiffs or the circuit court without the later production of above-quoted correspondence between Culpepper's counsel and the NCAA.

In post-trial proceedings the Defendants were ordered to produce correspondence leading up to the execution of the written November 2004 settlement agreement, which indicated that an oral settlement agreement had preceded the written one. The court reviewed correspondence between Culpepper and the NCAA in order for it to ascertain

whether they affected the meaning of the agreement. [C.13740-41]. The correspondence indicates that an *oral settlement agreement* was actually reached several months earlier on July 12, 2004. A letter of that date from counsel for Culpepper to the NCAA's counsel stated:

> I will redraft the agreement and forward it to you to confirm this agreement. However, as previously discussed, we [57] will await formal execution by the parties of the agreement until following Culpepper's deposition in this case. However, ***the formal execution of such settlement agreement should, in no way, affect the validity of our agreement regarding the terms of this settlement***, as attorneys for the parties.

[C.13742] (Emphasis added). Then, in a letter dated July 26, 2004 to the NCAA, Culpepper's counsel stated:

> Please find enclosed the redrafted Confidential Agreement and Waiver and Release of Claims to be entered into by the NCAA and Tom Culpepper. We believe that this agreement has been drafted to reflect the understanding that has now been reached regarding the terms and conditions for this agreement and release. Please let me know if you have any problems with the redraft. **Otherwise, pursuant to our agreement, this document will not be executed until after the deposition of Mr. Culpepper has been concluded.**

[C.13748] (emphasis added). Thus, the Defendants specifically delayed execution of the written agreement until after Culpepper's deposition so that he could deny its existence.

Appendix E

STATEMENT OF THE STANDARD OF REVIEW

Because there are several issues in this appeal relating to the resolution of claims at various stages of the proceedings below, differing standards of review are applicable. However, each standard is de novo.

The circuit court granted summary judgment on several of the Plaintiffs' claims. **The standard of appellate review applicable to a trial granting of a summary judgment motion is *de novo*.** The appellate court must determine if there was a genuine issue of material fact and, [58] if not, whether the movant was due a judgment as a matter of law. The appellate court must view the evidence in a light most favorable to the non-movant, resolve all reasonable doubts against the movant, and determine whether the non-movant presented substantial evidence in support of his claim. *Latham v. Department of Corrections,* 927 So.2d 815, 819 (Ala. 2005); *Wilson v. Brown,* 496 So.2d 756, 758 (Ala. 1886).

The circuit court granted a directed verdict on the certain claims of Plaintiff Williams. **The standard of appellate review applicable to a trial granting of a directed verdict is also *de novo*.** The appellate court must determine whether there was sufficient evidence presented to produce a conflict warranting jury consideration. The court must review the evidence most favorably to the non-movant and resolve all reasonable doubts against the movant. *Delta Health Group, Inc. v. Stafford,* 887 So.2d 887, 895 (Ala. 2005); *City of Birmingham v. Sutherland,* 834 So.2d 755, 758 (Ala. 2002).

The circuit court also granted a new trial to Defendant Culpepper following a jury verdict in favor of Plaintiff

Cottrell, where the court held it had made errors of law. **The standard of appellate review applicable to a trial granting of a motion for new trial is generally abuse of discretion; however, where the ruling is based on questions of law or the application of the law to the facts the standard of review is *de novo.*** *Holly v. Huntsville Hosp.*, 925 So.2d 160, 162 (Ala. 2005).

[59] **SUMMARY OF THE ARGUMENT**

I. INTRODUCTION.

This is a defamation case by Ronnie Cottrell and Ivy Williams, former assistant coaches for the University of Alabama football team, against the NCAA and others who were members of a conspiracy to bring punitive sanctions upon the football program. Although the goal of all the members of the conspiracy may not have been to destroy the coaching careers of Cottrell and Williams, it was the goal of at least one member of the conspiracy, college football recruiting analyst Tom Culpepper, and the others exhibited reckless disregard for how the Plaintiffs' careers and lives would be affected. The Plaintiffs' once successful college coaching careers were destroyed by a combination of false and defamatory statements. **The defamation occurred through "leaks" to the media to which the Plaintiffs could not respond because they were under an NCAA "gag order" during its investigation, through direct personal attacks upon their reputation, and, finally, through publication of false information on the NCAA's own official internet web site indicating that the Plaintiffs had been placed under an 8-year "show cause order," the death knell to a coach's career.**

II. THE CIRCUIT COURT'S ERRORS.

The circuit court's rulings in this case have been fraught with inconsistency and error. For example, the court first ruled that [60] Williams was a "private figure" under defamation law and denied summary judgment to the Defendants as to him [C.12567-74], but then at trial ruled at the close of Williams' case-in-chief that he was a "public figure" and granted a directed verdict to the Defendants. [R.2585,2728-29,2690] With regard to Cottrell, the court incorrectly ruled that he was a public figure and granted summary judgment to the NCAA Defendants [C.12567-74], then ruled at the close of evidence at trial against Culpepper that he was a private figure in relation to Culpepper's statements. [R.3167,3174-77] This resulted in Cottrell's claims against Culpepper being submitted to the jury, who returned a verdict awarding $6 million in compensatory damages and $24 million in punitive damages. [R.3251; C.13934] Thereafter, however, the court overturned the verdict and ordered a new trial based upon the court's decision that it had erred in two legal rulings and thereby caused prejudice to Culpepper. [C.13895-96] Thus, at this point, upon appeal, the Plaintiffs are no closer to obtaining the justice they sought than they were when the suit was filed.

Cottrell and Williams' most important claims against the NCAA Defendants are based upon two differing types of defamatory statements at two differing periods of time. ***First*, during the period of the NCAA investigation itself, beginning in November 2000, the Plaintiffs were repeatedly defamed by what can be called "conspiracy media leaks."** [61] These "leaks" consisted of false and defamatory statements regarding the Plaintiffs that were

provided for purposes of publication to members of the media by either the NCAA Defendants, primarily Johhaningmeier, or by Culpepper, another member of the conspiracy, for which the NCAA is also liable. **During this key period following the Letter of Inquiry to Alabama, when the Plaintiffs' reputations as coaches was critically important in seeking employment (after the entire staff was let go in the wake of a 3 win, 8 loss season), the Plaintiffs were caused by the NCAA's own Bylaws to be unable to defend their reputation because they were not allowed to publicly comment on the ongoing investigation.** *See* Bylaw 32.1.4 (quoted below). The Plaintiffs argued to the circuit court that at this crucial time, the NCAA "gag order" prevented any potential access to the media that these men may have possibly had. [R.436] Thus, any potential ability to have access to the media on the part of Cottrell and Williams which the circuit court held made them at least a "limited purpose" public figure was to no avail, and their inability to counter these false reports leaked by members of this NCAA-driven conspiracy plainly renders them "private figures" as to these statements. The circuit court erred in granting summary judgment for the Defendants on these claims [sic]

Next, in the period of time following the release of the NCAA's Report on Infractions [C.5709-32,7864-71], **in February 2002, the NCAA** [62] **published false and defamatory statements regarding the Plaintiffs on its internet web site in a "Penalty Summary" of the Alabama infractions case.** [C.7873-77] From February 2002 until October 2003, this internet web page contained a statement that Alabama's "recruiting coordinator," clearly a reference to Cottrell, had a "show cause

provision," placed upon him by the NCAA. [C.7873] This statement is claimed by the NCAA to merely be accidental occurrence. [R.2594] However, the web page statement is consistent with the plainly intentional statement in the NCAA News Release that "Alabama's recruiting coordinator," Cottrell, had a "de facto show cause order statement placed upon him." [C.7870] Moreover, the same "Penalty Summary" web page also contained a false statement that "employees" (plural) of Alabama had show cause provisions placed upon them. [C.7873] This statement is plainly a reference to Cottrell and Williams, who were the only employees of Alabama that had been named in the Letter of Inquiry. [C.5593-5600,5603-5609] No one at the NCAA double-checked the Penalty Summary for error before publication, nor was it ever checked after the fact. The first statement noted above found on the NCAA Penalty Summary was not removed until October 2003, some eighteen months after publication, when the error was pointed out to the NCAA. The second statement was not removed until October 2004, another year later, again only when the error was pointed out to them. The NCAA exhibited *reckless* [63] *indifference* to its making such errors, and once corrected, merely issued an apology on the page for two days, and never sought to contact NCAA member institutions to correct its public assertion that show cause order existed against the defendants. This is so even though the stigma of a show cause order is enough to destroy a college coaching career. The circuit court erred in granting the NCAA a summary judgment against Cottrell on this claim, and a directed verdict against Williams.

The Plaintiffs claims against Culpepper are based upon the false and defamatory statements he

made about them to many other persons associated with college football-related media in Alabama during and after 2001. These statements by Culpepper were associated with evidence of great malice existing on his part in relation to the Plaintiffs, especially Cottrell, who he wanted to make sure would never coach in college again. [C.8533;R.1419,1423,1472,1497,1512-13; Pl Trial Exh. 93B] The circuit court erred in granting Culpepper a directed verdict on Williams' claims [R.2728-29], and a new trial to Culpepper following a jury verdict for Cottrell.

III. RELIEF REQUESTED.

Many of the circuit court's errors can be corrected by this Honorable Court holding, as is required under the facts and relevant law, that Cottrell and Williams, who were only assistant football [64] coaches at Alabama, are private figures under defamation law, rather than any type of public figure. This is particularly true with regard to the defamatory statements made by the Defendants during the period of time they were under the NCAA's "gag order" and could not publicly comment to defend their reputation. Given a finding that the Plaintiffs were private figures, the circuit court's grant of summary judgment and a directed verdict to the Defendants on certain claims would have to be reversed.

This Court should further hold that that there was no error and no prejudice to Culpepper when the circuit court finally ruled correctly, at the close of evidence, that Cottrell was a private figure as to the claims at issue, since the lower court's ruling was based on a narrowing of the evidence and claims that were actually tried and that Culpepper himself had sought. [R.3167,3274-77]

Appendix E

ARGUMENT

"Now where do I go to get my reputation back?"[21]
Ray Donovan, U.S. Secretary of Labor, 1987

Plaintiffs Ronnie Cottrell and Ivy Williams, seemed to have everything going for them in December 1999. They were assistant football coaches for the University of Alabama ("Alabama") football team that had just won the championship game of the Southeastern [65] Conference. They were successful in both their professional and family lives. But little did they know that within a few months a conspiracy would form among powerful persons desiring to bring ruin to the Alabama football program, and that their reputations, careers, and lives would suffer irreparable injury as "collateral damage" to the aim of the conspiracy. Because of the actions of the Defendants, both Cottrell and Williams have gone from being upwardly mobile in their Division I-A college football coaching careers to having their professional reputations ruined, leaving them practically unemployable as college football coaches, such that even now, years later, they toil in far lesser jobs at less than half their former salaries.

So where do these men go to get their reputations back? To the extent that such is possible, Cottrell and Williams have turned to the Alabama judicial system for fairness and justice, seeking the remedies provided by law for the wrongs they have been forced to suffer. They brought defamation, false light invasion of privacy, and

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[64] [21] This poignant question was asked by Ray Donovan, Secretary of Labor in the Reagan administration, when he was acquitted of federal larceny and fraud charges, after having already been judged guilty in media reports.

other claims against Defendants the NCAA; Richard Johhaningmeier, an NCAA investigator; Thomas Yeager, the head of the NCAA Committee of Infractions; and Tom Culpepper, a recruiting analyst and college football media person; who were active members of the conspiracy. Alas, after several years of litigation in the Tuscaloosa Circuit Court, Cottrell and Williams did not find justice, but rather the [66] bitter taste of repeated court rulings which threw out their claims and thereby protected the NCAA and other Defendants from any legal liability.

I. A SUMMARY OF THE CONSPIRACY'S ORIGIN, ACTIONS, AND EFFECT ON THE PLAINTIFFS.

During the late 1990's a number of highly recruited high school football players from Mississippi, Alabama, and Memphis spurned the Tennessee Volunteers and signed scholarship papers with the Alabama Crimson Tide. On April 13, 1998, Phillip Fulmer, head coach of the Tennessee football team, complained in correspondence to SEC Commissioner Roy Kramer that he believed these players had signed with Alabama because Logan Young was paying money either to the player, his parents, or his coach. [C.6401-02] Fulmer sent additional correspondence to Kramer regarding football players Alabama had recruited. Even though he had no evidence of wrongdoing, there is no doubt from these letters that Fulmer wished Alabama to be investigated and sanctioned by the NCAA and that he expected Kramer to oblige.

Not long after Kramer received his first letter from Fulmer, the conspiracy began to form. Kramer hired SEC contract investigator Bill Sievers to begin investigating Young. [C.6202-03,6258-68,6435,6437, 6494] Sievers also

made contact with NCAA investigator Richard Johanningmeier in 1998 and reported it to Kramer. [C.6202-10] Thus, within just a few months the initial steps had been taken to have the [67] NCAA open an investigation of Alabama – the only thing missing was proof that Alabama had actually been involved in any wrongdoing.

In July 1999, Sievers learned from an assistant coach at Tennessee that Lynn Lang, the head football coach at Trezevant High School in Memphis, where Logan Young lived, had requested a large cash payment for prized football player Albert Means to sign with Tennessee. [C.6941-42] Seivers reported the information to Kramer and suggested that Lang could be charged by law enforcement with solicitation of a bribe and extortion.[C.6941-42] However, Kramer did not contact law enforcement regarding Lang, and also did not provide the information to Alabama, who was recruiting Means. These omissions occurred as a part of the conspiracy, so that Alabama would remain ignorant of the situation and would continue to recruit Means as Tennessee and other schools backed off his recruitment. It was even more fortuitous that Lynn Lang and Means were in Memphis, so that Logan Young could be swept up into the investigation as Fulmer had wanted. The trap was now set for the unsuspecting Alabama football program.

The 1999 football season was excellent for Alabama, and they won yet another SEC championship. In February 2000, they signed a recruiting class of all-star high school players, including Albert Means. Thus, the conspiracy had all it needed, and the trap began to close. Just a month later, in March 2000, NCAA investigator [68] Johanningmeier began his investigation of Means' recruitment by Alabama,

focusing on two scapegoats, recruiting coordinator Ronnie Cottrell and assistant coach Ivy Williams, who had recruited Means.

The next person to join the conspiracy was college football recruiting analyst Tom Culpepper, who was friendly with Fulmer and who hated Cottrell for cutting off the access to the Alabama football offices that he had enjoyed under the prior recruiting coordinator. [C.5967] Fulmer was not satisfied with having pushed Kramer to begin an investigation into Alabama football. He wanted to ensure it was successful in finding violations, and in August 2000, he again got personally involved. Fulmer and his attorney met with Culpepper for about eight hours, requested that Culpepper speak to the NCAA, and secretly recorded a portion of the interview. [C.7099-7100,7175-77] Culpepper was interviewed by Johanningmeier a few days later, and agreed to be a confidential witness against Alabama, though it was clear that he was motivated by his hatred of Cottrell, who he desperately wanted to force out of college coaching. [C.7190,8533]

Even though as of August 2000, the NCAA had information from 10 sources of potential problems involving Means' recruitment, it failed to inform Alabama, and thus allowed Means to enroll in school and play during the 2000 season. *See* fn. 12. But if the NCAA had given notice to Alabama at that time, Alabama's NCAA compliance personnel would have [69] blocked his admission, *see* fn. 12, and Alabama could have escaped the trap. Instead, Alabama was not notified of any problems until November 2000, after Means had played, when Johanningmeier came to Alabama to interview coaches and staff, including Cottrell and Williams. [C.5969,6950,7070,7489-90] By that

time, the trap first envisioned by Fulmer two years earlier had finally snapped closed.

The 2000 season was disastrous for Alabama, and the team finished with a three-win, eight-loss season. Cottrell and Williams were let go from their coaching positions when Coach Dubose was fired, and they needed to find other coaching positions. Accordingly, their reputations among the coaching peers and college athletic administrators were never more important. However, Culpepper had been spreading negative rumors about Cottrell to his acquaintances in the media for some time and in 2000 his attack intensified, as he included Williams as well. He made defamatory statements regarding Cottrell and Williams to such noted persons as Rodney Orr (founder of the Tider Insider internet web site) [C.1292-96], recruiting analyst Forrest Davis [R.1730-31], and, in a lengthy private telephone call, Birmingham sports talk radio host Paul Finebaum. [R.1649-74] As Culpepper wanted, Finebaum repeated many of these statements on his highly popular radio show. [R.1652] Culpepper continued making defamatory statements regarding Cottrell and Williams in 2000 as well, quite satisfied that Cottrell was now [70] unemployed. [PTE 93; R.1473-74,1487] Some of the statements Culpepper made during this time regarding Cottrell were that Cottrell had abandoned his children and had committed embezzlement and theft, all defamatory per se. [R.1495-97,1604-05]

During 2001, the Plaintiffs continued to seek employment, but without success, as newspaper reports began to be published regarding the NCAA investigation of Alabama which revealed confidential information obtained from the NCAA, and which portrayed Cottrell and Williams in a false

light as being guilty of major NCAA rules violations, including payment of money in the recruitment of Albert Means to Alabama. [C.7830-32,7335-38,7840-42] Cottrell and Williams wished to respond publicly to defend their reputations, they could not, as such comment was prohibited by the NCAA bylaws, leaving them helpless in the face of media reports. The NCAA investigation and news coverage dragged on and the NCAA issued its Report on Infractions in February 2002. [C.5709-32,7864-71] The NCAA did *not* find Cottrell or Williams involved in any wrongdoing in the recruitment of Albert Means, yet their reputations were forever tarnished. The NCAA's own News Release relating to its infractions report on Alabama recognized the stigma now attached to Cottrell from the investigation as it noted that it had not imposed a "show cause Order" on him, but it was not necessary because he was **"out of college coaching, under what the** [71] **committee considered to be a *de facto* show cause order."** [C.7870] Accordingly, Fulmer, Kramer, and the NCAA got what they wanted, severe sanctions on Alabama, and key secret witness Culpepper had gotten what he had wanted, Cottrell out of college coaching, which is where he still is today. The conspiracy's work was done.

But not quite. On the same day the NCAA issued its Report on Infractions in February 2002, the NCAA also published a Penalty Summary on the Alabama case on its web site, *www.ncaa.org*. That Summary falsely stated that the sanctions on Alabama included a show cause order on its recruiting coordinator, and that there were show cause orders on "employees" of Alabama. [C.7873-77] Of course, Cottrell was the recruiting coordinator at issue in the case, and he and Williams were the only coaches who had been specifically investigated by the NCAA. While the NCAA

claims the highly defamatory statements were not published intentionally, the NCAA exhibited reckless disregard for the rights of Cottrell and Williams, as the information in the Summary was *never* double-checked for error, even when the information was updated in September 2003 to note that the sanctions against Alabama had been upheld on appeal. Finally, Plaintiffs' counsel notified the NCAA of the first error in October 2003, and it was corrected [C.7879-81], but even them the NCAA did not check for other errors, and the second defamatory statement remained on the Penalty Summary until October [72] 2004. [C.7877]

This combination of defamatory statements damaged the Plaintiffs' reputations to such an extent that they remained unemployed in the coaching profession for several years and have only found employment at the level where they had started decades before, at less than half their former salaries.

II. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE NCAA DEFENDANTS ON THE PLAINTIFFS' CLAIMS BASED UPON "CONSPIRACY MEDIA LEAKS."

The circuit court's order on the Defendants' summary judgment motions did *not* specifically address the Plaintiffs' claims relating to the conspiracy's media leaks made during the course of the NCAA investigation of the Alabama football program beginning in November 2000, a time in which the Plaintiffs were under the NCAA's "gag order" and were unable to publicly respond to falsehoods and other information portraying them in a false light. The court failed to address the "conspiracy media leaks"

claims even though the claims and the NCAA gag order were discussed by the counsel for the NCAA Defendants [R.378] and by Plaintiffs' counsel [R.436,447,463-64] at the hearing on the summary judgment motions just days before the court's ruling, as well as having been extensively briefed by the Plaintiffs. [C.8185-93] Instead, the court first vaguely ruled that there was not substantial evidence that Yeager or Johanningmeier were guilty of any actionable conduct toward [73] the Plaintiffs, so those Defendants were due summary judgment on all claims. [C.12572] The court held that even though Williams was a private figure, summary judgment was due to be granted on all his claims against the NCAA except those relating to the internet web site publication. [C.12569-70,12573] Finally, the court held that Cottrell, as the recruiting coordinator for Alabama, was a public figure, and granted summary judgment to the NCAA on all of his claims because, according to the court, there was not clear and convincing evidence of "actual malice" by the NCAA or a conspiracy to defame Cottrell. [C.12570,12573-74] The circuit court erred in these rulings, as demonstrated hereafter.

A. The Key Difference Between "Public Figures" and "Private Figures".

The United States Supreme Court determined in ***New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710 (1964)**, that the First and Fourteenth Amendments to the United States Constitution control the legal standards by which a defendant may be found liable in a defamation

case.[22] Thus, the opinions of the United States Supreme Court itself are the very best source for determining the contours of defamation law. Perhaps the most important inquiry required by defamation law is whether the plaintiff is a "private figure" or a [74] "public figure," as the Supreme Court has determined that the appropriate level of constitutional protection to defamatory speech is controlled by the plaintiff's status. *Sullivan, supra; Curtis Publishing Co. v. Butts,* 388 U.S. 130, 87 S.Ct. 1975 (1967).

One may become a "public figure" by achieving "such pervasive fame or notoriety that he becomes a public figure for all purposes and all contexts." ***Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351, 94 S.Ct. 2997, 3013 (1974)**. Public figures are those persons who "have assumed roles of special prominence in the affairs of society." 418 U.S. at 345, 94 S.Ct. at 3009. Such persons are often referred to as "general purpose" public figures. The Supreme Court explained in *Gertz* that:

> We would not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes. Absent clear evidence of general fame and notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life.

418 U.S. at 352, 94 S.Ct. at 3013.

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[73] [22] The Supreme Court has also held that these same standards apply to a claim for false light invasion of privacy, which Plaintiffs have also brought. *Cox Broadcasing Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029 (1975).

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In *Gertz,* the Supreme Court further determined that a person may be a public figure for purposes of defamation law, even if one does not have a broad public prominence and influence in society, but does have such a level of prominence as to an issue of public concern or controversy into which the individual "injects himself or is or is drawn into." 418 U.S. at 351, 94 S.Ct. at 3013. Such persons are [75] generally referred to as "limited purpose" public figures. The *Gertz* court explained that limited purpose public figures "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." 418 U.S. at 345, 94 S.Ct. at 3009. Thus, with regard to limited purpose public figures, a public controversy must precede the individuals' actions intending to influence the controversy's outcome.

1. Importance of Media Access.

The reason the law differentiates between private figures and public figures is that, as the Supreme Court recognized in *Gertz* is that "[t]he first remedy of any victim of defamation is self-help using available opportunities to contradict the lie or correct the error and thereby minimize its adverse impact on reputation." 418 U.S. at 344, 94 S.Ct. at 3009.[23] The Supreme Court further explained in *Gertz* that:

> Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more

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[75] [23] The NCAA Defendants are in agreement that media access is the *key* factor to public figure status. [C.5066]

> realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.

418 U.S. at 344, 94 S.Ct. at 1009. *See Butts, supra,* 388 U.S. at 154, 87 S.Ct. at 1991; *Hutchison v. Proxmire,* 443 U.S. 111, 136, 99 S.Ct. [76] 2675, 2688 (1979). This public policy consideration was noted again by the Supreme Court in *Wolston v. Reader's Digest Ass'n,* 443 U.S. 157, 164, 99 S.Ct. 2701, 2705 (1979), where the Court stated:

> [W]e recognized that public figures are less vulnerable to injury from defamatory statements because of their ability to resort to effective "self-help." They usually enjoy significantly greater access than private individuals to channels of effective communication, which enable them through discussion to counter criticism and expose the falsehood and fallacies of defamatory statements.

In other words, public figures do not engender the same level of protection in the law from defamatory statements because they have, through their prominence in society, the unique and powerful ability to defend their reputation in the public media that private figure persons simply do not have.

B. Cottrell and Williams Were Not Public Figures as to the Conspiracy Media Leaks Because the "Gag Order" imposed by the NCAA's Bylaws Prevented them From Defending Their Reputations During the Investigation.

The NCAA Defendants argued in the circuit court that the Plaintiffs' access to the media while they were Alabama coaches, and since then, make them public figures.[24] The court recognized that [77] Williams was a private figure because he did *not* have "a position of public prominence that he was in a position to influence others." [C.12569-12570] The court held that Cottrell was a "limited purpose" public figure because the position of recruiting coordinator had "high profile" and "public prominence," that "it invited public attention," and he had "regular and continuing access to the media."[25] [C.12570]

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[76] [24] The NCAA Defendants argued that Cottrell and Williams were "public figures" by reason of their status as "coaches at one of college football's most famous schools" and because they "had substantial access to the media prior to the time any alleged defamatory statements were made about them and they have had even more access to the media after the alleged defamatory statements were made about them." [R.382-83] The NCAA Defendants further argued that by their relationship to Logan Young "[t]hey interjected themselves into the controversy surrounding him and by virtue of their status as public figures who have interjected themselves into the – into the association with the central figure of the investigation, they are by that – by that as well public figures." [R.384] However, these three contentions are either *inaccurate* or *irrelevant* to the question of the Plaintiff's status in relation to the conspiracy media leak claims.

[77] [25] The circuit court also stated in its summary judgment order that a factor which weighed in favor of Cottrell being a public figure is that he had achieved such prominence that "he was asked to have a charity golf tournament named after him." [C.12570] This assertion

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As assistant football coaches at Alabama, Cottrell and Williams may have had some limited media access before the NCAA investigation. **However, the NCAA's argument relating to the Plaintiffs' media access before the investigation is *irrelevant* as to this particular case because they lost any media access and the concurrent opportunity to influence public perception of them once the investigation began.**[25] [78] Bylaw 32.1.4 of the NCAA Division I Manual, titled "Cooperative Principle," states as follows:

> The cooperative principle imposes an affirmative obligation on each member institution to assist the NCAA enforcement staff in developing full information to determine whether a possible violation of NCAA legislation has occurred and the details thereof. **An important element of the cooperative principle requires that all individuals who are subject to NCAA rules protect the integrity of an investigation. A failure to do so may be a violation of the principles of ethical conduct.** The NCAA enforcement staff will usually share information with the institution during an investigation;

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was later proven false at trial when Eugene Ezell, president of the Choctaw County chapter of the Alabama alumni association testified that the chapter did have a golf tournament to raise funds for a scholarship program and that Cottrell had participated, but that the tournament *had not been named after him*. [R.1548-49]

[77] [25] The NCAA's additional arguments that Cottrell and Williams are public figures because of their involvement with Logan Young and because they interjected themselves into a public controversy, are based upon inaccurate assertions and are also irrelevant given their inability to make public comment during the NCAA investigation.

> however, it is understood that the staff, to protect the integrity of the investigation, may not in all instances be able to share information with the institution.

[C.5579] (Emphasis added)

This bylaw was, in effect, a "gag order" which prevented Cottrell and Williams from speaking to the news media during late 2000 and 2001 in response to the conspiracy's media leaks. The NCAA's gag order was thus in effect during a *key period* of time in which they were both first seeking employment, and it prevented them from protecting their reputations when the new perception of them by the public and by their coaching peers was being formed. The gag order left them completely *powerless* to influence public debate when they most needed to do so, causing them to be mere private figures regardless of any other facts. Surely, the NCAA should not be allowed the benefit of the legal classification of the Plaintiffs as public figures as to these claims, [79] when the NCAA itself prevented their access to the media, under a threat of an "unethical conduct" charge. The circuit court's rulings were incorrect and plainly unjust.

Cottrell's and Williams' inability to respond to media requests is evidenced by some of the newspaper articles that none other than the NCAA Defendants filed with the circuit court in support of their contention that Cottrell and Williams were public figures. The articles show that the Plaintiffs followed the NCAA's instruction to not make

public comment.[27] These articles provide such statements as:

- "Cottrell was not available for comment . . . " Tuscaloosa News, December 31, 2000.
- "'I can't comment on anything because of the situation with the other stuff (NCAA investigation), but I never had that conversation,' Williams said." Tuscaloosa News, January 11, 2001.
- "Williams declined to comment about the call records, citing the NCAA investigation." Tuscaloosa News, February 22, 2002.
- "NCAA bylaws require that all UA officials involved in the investigation refrain from discussion or comment that might impede the continuing investigation." Tuscaloosa News, February 23, 2001.
- "Cottrell, reached at his Tuscaloosa home, declined to comment, citing the ongoing NCAA investigation." Tuscaloosa News, June 1, 2001.
- "Williams, contacted by The Tuscaloosa News, declined comment." Tuscaloosa News, August 12, 2001.

[80] [C.5782-5909]

In his deposition, Ronnie Cottrell noted the occurrence of conspiracy media leaks and voiced his frustration at

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[79] [27] Other articles submitted to the court by the NCAA Defendants, which are from prior to the NCAA investigation or and after this lawsuit was filed, are irrelevant to the Plaintiffs' status as to the conspiracy media leak claims that occurred during the investigation in 2000-2001.

being unable to respond to them because of the NCAA "gag order:"

> Q. What – were there ever any misperceptions –
>
> A. There were just so many things that were released to the media, and I don't know how it got to the media. **When I met with the NCAA both times, I was told not to discuss what happened in the meetings, but every time it was out there.** The Michael Gaines issue which I was ultimately cleared of, was discussed in detail in the media, just great frustration.

[C.3250] (Emphasis added).

> A. But, in fact, after I had met with them the first time, I knew media was going to call me because they were calling me before I got there. I don't know how they knew I was going to be interviewed. **So I asked Rich Johanningmeier in the hallway, so I will be clear, and he told me that Ronnie, the worst penalty that you can have is an unethical conduct charge, and it is an unethical conduct charge for you to discuss anything that happened in this meeting. He said you just need to keep it confidential until this investigation is over.** And those were his exact words, Rich Johanningmeier, the enforcement person who interviewed me.

[C.3251] (Emphasis added).

> Q. So there is this whole bunch of rumors and what you believe to be false statements that

were being circulated about you out in the media about this time, right?

A. Yes.

Q. And you felt those were very damaging to you and your reputation?

[81] A. **Yes, sir, and probably the most damaging thing was not really being able to respond during that time. Robert, it was probably the most frustrating for somebody – for media to ask and not being able to respond to allegations, things that were being said, that was very frustrating.**

[C.3267-68] (Emphasis added).

Likewise, Williams experienced the frustration of not being able to caused to respond to the NCAA media leaks in his deposition: "[B]ut that's just like stuff being leaked in the meetings we had, you know, NCAA was running that, you know, they tell me I can't talk to the press, but they leak stuff." [C.4357] Williams further noted that one newspaper account contained alleged quotes from him, which he denied making, and that Johanningmeier became upset and specifically warned him in a subsequent interview that he could *not* speak to the press:

A. No, that was the second day when Johanningmeier was ticked because he thought I had aid something out of school. . . . . **And so he was going to tell me that I got to be quiet, I can't talk to the press. And I am saying I haven't talked to the press.**

Q. At the beginning of your second interview?

A. That's when it was.

[C.4358] (Emphasis added).

Accordingly, given this evidence of record, it was error for the circuit court to classify both Cottrell and Williams as public figures, either general purpose or limited purpose, for the period of the NCAA [82] investigation when the harm was done to their reputation by leaks of information by members of the conspiracy to the news media where it then appeared in print. It makes no difference that the Plaintiffs were assistant coaches at Alabama, that they occasionally gave interviews to sport reporters, or that they spoke to groups of Alabama alumni and fans. It also makes no difference that they had some type of relationship with Logan Young, who was at the center of the NCAA investigation (though these issues are addressed below as to other the other claims against the NCAA). Given the powerful effect of the NCAA's "gag order," they simply did not have the opportunity to influence public opinion as a public figure can do, and the "gag order" mandates that this Honorable Court hold that they were *private figures* as to the conspiracy media leak claims, such that only common law actual malice, rather than "constitutional actual malice," need be shown to prove their defamation and false light invasion of privacy claims. This Court must not allow the NCAA to use the gag order against the Plaintiffs as both a sword and a shield.

C. Plaintiffs Presented Substantial Evidence of Conspiracy Media Leaks.

While holding that Williams was a private figure, and Cottrell a public figure, the circuit court's summary

judgment order did not specifically address the Plaintiff's conspiracy media leak claims. The court held that there was "no legally admissible substantial evidence" [83] that NCAA employees Johanningmeier and Yeager "were guilty of any actionable tortuous conduct as to the plaintiffs." [C.12572] It further held that there "was no clear and convincing evidence of a conspiracy," to defame Plaintiff Cottrell. [C.12574]

These holdings by the circuit court demonstrate that it never grasped the nature of Plaintiffs' conspiracy media leak claims. First, Plaintiffs have never alleged that the intended purpose of the conspiracy was to defame them or destroy their coaching careers. Rather, Plaintiffs have alleged that the purpose of the conspiracy was to bring NCAA sanctions upon Alabama, and that the destruction of their reputations was merely an effect of the conspiracy's larger purpose.[28] [C.1635,1637] Moreover, Plaintiffs did present substantial evidence of leaks of NCAA investigation-related information to newspapers occurring during the NCAA investigation, which defamed or otherwise portrayed the Plaintiffs in a false light.[29]

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[83] [28] Under Alabama law, each member of a conspiracy is liable for the misconduct of other members of the conspiracy taken in furtherance of the conspiracy, including defamation, *see Hoover v. Tuttle*, 611 So.2d 290, 293 (Ala. 1992); *SeaChange Intern., Inc. v. Putterman*, 79 Ark.App. 223, 229-30, 86 SW.2d 25, 29 (2002), so the NCAA Defendants are liable for each others actions, as well as those of Culpepper in leaking information to the press.

[29] [83] These leaks occurred in violation of NCAA Bylaw 32.1.1, titled, "Confidentiality," which states:

> The Committee on Infractions, the appropriate appeals committee per Bylaw 19.3, hearing officers and the enforcement staff shall treat all cases before them as confidential until the

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[84] Here, substantial evidence was presented that Johanningmeier spoke with media persons during the investigation [C.7179-7200,7787-88], that Johanningmeier passed confidential information to Culpepper who then passed it to the media [C.7160,7544,7821-26], and that confidential information regarding the investigation appeared in news articles which defamed and or portrayed the Plaintiffs in a false light, as having violated NCAA rules, even though the NCAA Letter of Inquiry was not sent to Alabama until September 5, 2001 and its contents were not made public until September 8, 2001.[30] [C.7847-89] Under NCAA Bylaw 19.3, fn. 26, *supra,* all the information and allegations contained in the LOI was required to have remained confidential, but there had been leaks over the prior year (while the Plaintiffs were seeking new employment).

While it is true that the Plaintiffs could not present direct [85] evidence that the NCAA Defendants leaked information gained about them during the supposedly

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same have been announced in accordance with prescribed procedures.

[C.5579]

[84] [30] These were not statements of "opinion," but, instead, allegations of fact about alleged NCAA infractions, rule violations, improper conduct, or similar activity, supposed to have been engaged in by one or the other of the plaintiffs. *See, e.g., Liberty Nat. Life Ins. Co. v. Daugherty*, 840 So.2d 152 (Ala. 2002), where this Court, through Justice Lyons, stated that even if words do not impute a crime (i.e., "actionable *per se*"), an action for defamation may be maintained for language "subjecting the plaintiff to disgrace, ridicule, odium or contempt" (i.e., "actionable *per quod*"). Here, the Plaintiffs have alleged such language subjecting them to disgrace, ridicule, odium or contempt, and have alleged special damages as a result thereof, including actual harm to reputation and actual loss of job, position and income.

confidential investigation of Alabama to Culpepper and other media persons, neither the existence of a conspiracy claim nor a tort need be proven by direct evidence. For example, the new Alabama Practice Jury Instruction 43.01 on the evidentiary proof required to show a civil conspiracy states that it may be proven "by inference and circumstantial evidence." This Honorable Court also stated in *Luck v. Primus Automotive Financial Services, Inc.*, 763 So.2d 243, 247 (Ala. 2000), that: "In order to prove a conspiracy, a plaintiff may present circumstantial evidence." Moreover, it is well-established in this Court's case law that a plaintiff may also prove the commission of a tort by substantial evidence with circumstantial evidence.[31] It was stated as clear as possible by this Court in *Carruth v. Pittway Corp.*, 643 So.2d 1340, 1346 (Ala. 1994), when this Court wrote: "Circumstantial evidence can constitute 'substantial evidence.'" Thus, substantial evidence of the Plaintiffs' conspiracy media leak claims can be shown by circumstantial evidence and, in this instance, the circumstantial evidence proffered [86] by the Plaintiffs meets that burden of proof.[32]

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[85] [31] *See Palm Harbor Homes v. Crawford*, 689 So.2d 3, 9 (Ala. 1997) (noting that circumstantial evidence may provide "substantial evidence"); *Bell v. Colony Apts. Co.*, 568 So.2d 805, 810-11 (Ala. 1990) ("A fact is established by circumstantial evidence if it can be reasonably inferred from the facts and circumstances adduced."); *Woodley v. City of Jemison*, 770 So.2d 1093, 1096 (Ala.Civ.App. 1999) (noting that circumstantial evidence may provide "substantial evidence").

[86] [32] Given that members of the media have an *evidentiary privilege* which protects them from being compelled in a legal proceeding to divulge their confidential sources, Ala. Code 1975, § 12-21-142, the only possible means by which Plaintiffs could prove this claim, absent an admission by the NCAA Defendants, is by way of circumstantial evidence.

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Here, under the NCAA Bylaw 32.1.1 [C.5579], NCAA personnel were required to keep all the information related to the investigation confidential. However, there were clearly leaks of information to the media, as indicated by language in these examples of news articles:

- "However, sources close to the NCAA probe said Thursday that. . . . " [C.7835-7838]
- " . . . although sources close to the investigation say. . . . " [C.7851-53]

The leaks had to come from persons involved with the investigation, either the NCAA Defendants or persons on the Alabama side such as Gene Marsh and Marie Robbins. There is direct evidence Johanningmeier did speak to persons in the media during the investigation [C.7787-88,8544-45], and there is certainly no motivation for anyone representing Alabama in the NCAA investigation to bring public attention to it by providing details of compliance issues that arisen on their watch. There is also evidence of record that the NCAA Defendants bore ill will and malice toward the Alabama football program and the Plaintiffs, which provides the motivation for such media leaks. This begins with the evidence previously noted of the NCAA's failure to notify Alabama [87] of the issues relating to the recruitment of Albert Means that had been reported to the SEC as early as May 1999, so that Alabama compliance personnel could have prevented him from being signed by Alabama in February 2000 or at least prevented him from enrolling in school and participating on the football team in August 2000. Further evidence of the NCAA Defendants' motivation and the reckless disregard they have exhibited toward the Plaintiffs is the News Release stating there was a "de facto show cause order" on

Cottrell, and the false and defamatory statements regarding them contained on the Penalty Summary posted on the NCAA internet web site, which was never double-checked and stayed in the Summary for as long as nearly three years. Certainly, secret witness Culpepper, who was closely involved with Johanningmeier [C.8543-48,7774-44], admitted to speaking to media persons regarding Cottrell and Williams. When viewed in a light most favorable to the Plaintiffs, and resolving all reasonable doubts against the NCAA Defendants, as this Court must on review of an order granting summary judgment, *Latham, supra*; *Wilson*, supra, all this evidence, though mainly circumstantial, amounts to substantial evidence in support of the conspiracy media leak claims. Accordingly, the circuit court erred in granting summary judgment to the NCAA Defendants relating to Plaintiffs' conspiracy media leak claims, which are due to be decided by a jury.

[88] **III. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE NCAA ON THE INTERNET WEB SITE CLAIMS.**

Both Cottrell and Williams brought several claims, including defamation and false-light invasion of privacy, against the NCAA relating to the February 1, 2002, publication on its internet web site, in a "Penalty Summary" relating to the sanctions against Alabama, certain statements indicating that a "show cause order" had been placed on the Plaintiffs. The facts of this false and defamatory publication are detailed in the Statement of Facts, *supra*.

Thus, key issues as to these claims is whether the circuit court erred in holding that the Plaintiffs were

limited purpose public figures and, if there was no error as to that issue, whether the court erred in holding that there was not clear evidence of actual malice on the part of the NCAA.

A. Cottrell and Williams Were Not Limited Purpose Public Figures Before the NCAA's Internet Publication Relating to the Investigation of Alabama, but Private Figures.

Unlike a "general purpose" public figure, a "limited purpose" public figure is not a public figure by virtue of some prominence or notoriety with the public at large for all purposes, but instead has only such prominence with respect to an *issue of public concern* which he himself has *voluntarily* engaged the public's attention in order to influence its outcome. *Gertz*, 418 U.S. at 351-52. Moreover, it is the defendant that bears the burden of proof as to demonstrating that the [89] plaintiff is a limited purpose public figure. *See Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 592 (1st Cir. 1980); *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541, 1553 (4th Cir. 1994). The NCAA simply never met is burden of proof.

To determine whether a plaintiff is a "limited purpose" public figure, a court must first determine whether there was a particular and identifiable public controversy prior to the defamation that the plaintiff voluntarily involved himself in to such an extent that he assumed a role of public prominence or attained a position from which to influence others or the outcome of the public controversy. A court must also determine whether the plaintiff had the requisite level of regular and continuing access to the

media before the defamation. *Gertz*, 418 U.S. at 345; *Hutchinson*, 443 U.S. at 134-35; *Clark v. American Broadcasting Co., Inc.*, 684 F.2d 1205 (6th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1982); *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980).

1. The Plaintiffs Did Not Involve or Otherwise "Thrust" Themselves Into Any Public Controversy Prior to the Defamation.

There is no evidence that the Plaintiffs "thrust themselves to the forefront" of any public controversy before the defamation alleged in this case. In arguing otherwise, the NCAA Defendants were trying to make the Plaintiffs public figures based on the very topic of the [90] defamation at issue in this case. As the Supreme Court has stated, "those charged with defamation cannot, by their own conduct, create their own defense by making a claimant a public figure." *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979).

A review of the Plaintiffs' status *before* the defamation at issue clearly shows that they had not involved themselves in any public controversy in an attempt to influence its outcome.[33] The Supreme Court made it clear in *Gertz* in

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[90] [33] Before the defamation that occurred here when the NCAA published false information in the Penalty Summary for Alabama's infractions case on its website, neither Cottrell nor Williams had taken any action to place themselves at the forefront of the public controversy involving the NCAA investigation. Indeed, just the *opposite* is true. **They were under the NCAA "gag order" until the NCAA's Report on Infractions was released and the false and defamatory**

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order to be held a limited purpose public figure a person must have "thrust themselves to the forefront" of a public controversy so as to become factors in its ultimate resolution. *Gertz*, 418 U.S. at 345; *Waldbaum*, 627 F.2d at 1297. Under these principles, the Plaintiffs must have achieved some "special prominence" in the public debate about alleged NCAA recruiting violations by Alabama for the purpose of trying to influence the outcome of it in order to be limited purpose public figures. *Gertz*, 418 U.S. at 351.

[91] If the Plaintiffs can be said to have ever become involved in the public controversy of the NCAA investigation, it was only well *after* the occurrence of defamatory statements on which this these claims are based, when they filed this lawsuit and brought public scrutiny to the false and defamatory statements of the NCAA. **While the NCAA brought the media statements of the Plaintiffs and their counsel to the circuit court's attention, this media access was the direct result of the NCAA's defamation and this lawsuit.** The Supreme Court made clear in *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), that a Defendant cannot argue that a plaintiff had the continuing and regular access to the media of a public figure if that level of media access was the result of the alleged defamation. 443 U.S at 134-35. In *Hutchinson*, a professor sued a United States senator for defamation

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statements were published on the NCAA internet web site on February 1, 2002. Prior to the publication of the false statements by the NCAA on the internet, the Plaintiffs involvement in that controversy was limited to merely having certain alleged actions of theirs a topic of public discussion, but without the opportunity to publicly defend their reputation, so they did *not* thrust themselves to the forefront of the controversy.

after the senator referred to his studies as an example of wasteful spending. The senator argued that the professor was a limited public figure because local newspapers often reported his success in obtaining grants of federal funds and because the professor had access to the media. The court held, however, that none of these factors demonstrated "that [the professor] was a public figure prior to the controversy engendered by the [senator's comments]" and that any access to the media enjoyed by the professor was a direct result of the alleged defamation. *Id.*

[92] Thus, under *Hutchison, supra, Gertz, supra,* and other case law,[34] the NCAA could not properly use the *after-the-fact* media coverage of this lawsuit as evidence on whether the Plaintiffs were limited purpose public figures before the defamatory statements at issue were made, yet the NCAA tried to do so in this case. [C.5894-5909] The circuit court plainly erred to the extent it relied on such documents in concluding that both Cottrell and Williams were limited purpose public figures.

2. The Plaintiffs Did Not Have Regular and Continuing Access to the Media Before the Defamation.

The Plaintiffs did *not* have the regular and continuing media access required of a public figure or even a limited

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[92] [34] Other courts have similarly held that any access to the media resulting from a controversy originally generated by the alleged defamation does *not* make the plaintiff a public figure. *Kassel v. Gannett Co., Inc.*, 875 F.2d 935, 941 (1st Cir. 1989); *Fitzgerald v. Penthouse International, Ltd.*, 691 F.2d 666, 668 (4th Cir. 1982); *Waford v. Lexington Herald-Leader Co.*, 789 S.W. 2d 758 (Ky. 1990).

purpose public figure before the defamation engaged in by the NCAA in February 2002, which continued for nearly two years. As discussed above, during the period of the NCAA investigation from November 2000 until the NCAA's Report on Infractions was released in February 2002, the NCAA's gag order *prevented* the Plaintiffs from having the media access necessary to influence the outcome of the public controversy regarding alleged NCAA rules violations. While the Plaintiffs did have some access to the media *before* the NCAA investigation because of their positions as [93] assistant football coaches at Alabama, even then they did not have the regular and continuing access of a limited purpose public figure.

In order to try and meet its burden of proof on this issue, the NCAA filed in support of its summary judgment motion and as evidence at trial many news articles in which the Plaintiffs were mentioned. [C.5783-5847] However, the topic of vast majority of these articles was the Alabama football program itself, rather then Cottrell or Williams, who are generally mentioned only incidentally. The NCAA especially noted several articles published before the NCAA investigation which reported on Alabama's football recruiting wherein Cottrell was quoted and or discussed, particularly one article published in The Sporting News in January 2000, which noted his success as a recruiting coordinator. [C.5794-5800] The NCAA argued that the article was evidence that Cottrell had widespread public notoriety. This assumption, however, is contradicted by the testimony of the NCAA's own key employee and witness, Shep Cooper, which the circuit court never considered in review of the NCAA's summary judgment motion.

a. The Circuit Court Erred in Ruling on the NCAA's Summary Judgment Motion Without Considering Shep Cooper's Deposition.

As noted in the Statement of the Case, the circuit court ruled prematurely on the Defendants' motions for summary judgment, before the deposition of NCAA official Shep Cooper could be filed with the court. [94] It was a violation of the Plaintiff's constitutional due process rights for it to do so,[35] and it adversely affected Cottrell in particular because in his deposition Cooper made an admission relevant to the issue of Cottrell's public notoriety, a factor considered on whether he was a limited purpose public figure.

The court's conclusion that Cottrell had notoriety as Alabama's recruiting coordinator is *belied* by the assertion made in deposition by Cooper, who is on the NCAA's Committee on Infractions, that Cottrell had such little notoriety that even other college coaches would *not* know he was formerly the recruiting coordinator at Alabama. Cooper stated: "Certainly within the state – within the state of Alabama, he was [known to coaches], but I don't know that within the coaching community they would know that [Cottrell's] the recruiting coordinator." Exhibit 1 (Cooper Depo, at 86). This statement serves as an *admission* by the

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[94] [35] The Plaintiffs have filed a motion with this Court to supplement the record on appeal with the Cooper deposition, which must be reviewed in order to demonstrate the circuit court's error. The motion was originally filed with the circuit court, but the motion was not ruled on within 14 days and is thus deemed denied pursuant to Rule 10(f), Ala.R.App.P. A copy of the motion to this Court is attached hereto as Exhibit 1.

NCAA that Cottrell did not have sufficient public notoriety to be deemed a limited purpose public figure.

At trial, the NCAA had introduced into evidence many news articles mentioning Williams. [NCAA Trial Exh. 239-245,246,261] However, review of these finds that they are primarily composed of a few short articles [95] noting Williams hiring by a particular college football program, and many that simply mention or quote Williams in passing regarding the true focus of the article, such as the play of the Alabama running backs he coached. The few articles spaced out over several years that focus on Williams himself do not demonstrate the degree of media access associated with a public figure, or even limited purpose public figure.

The Supreme Court and other courts have repeatedly held that occasional access to the media prior to the defamation does *not* render a person a public figure, or even a limited purpose public figure. For example, in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), an attorney with extensive professional and community activities, who had voluntarily associated himself with a case that attracted significant media attention, was *not* held to have enjoyed the level of regular and continuing access to the media required of a "limited purpose" public figure. 418 U.S. at 323. Similarly, in *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), the Supreme Court likewise held that a professor who had access to the media, which often reported on his success in obtaining grants of federal funds did *not* have a level of access to the media that would render him a "limited purpose" public figure.

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In *Time-Inc. v. Firestone*, 424 U.S. 448 (1976), the Supreme Court held that a wealthy figure involved in a highly publicized divorce proceeding was not a "limited purpose" public figure before the alleged [96] defamation simply because she had held press conferences during the divorce proceedings. *Id.* at 445 n. 3. Lastly, in *Waford v. Lexington Herald-Leader Co.*, 789 S.W. 2d 758 (Ky. 1990), the Supreme Court of Kentucky held that a college assistant basketball coach did *not* have the sufficient level of media access to render him a "limited purpose" public figure simply because he had received occasional press attention. 789 S.W.2d at 771. The Court in *Waford* said that the plaintiff would still lack the sufficient media access even if it were reasonable to speculate that local media would publish the plaintiff's views on some nationwide recruiting controversy. *Id.* at 771.

3. Summary of the Limited Plaintiffs' Media Access.

The NCAA filed with the circuit court and had admitted into evidence at trial, numerous news articles relating to Cottrell and Williams in support of their argument that they were public figures or limited purpose public figures. As noted above, these articles must be separated into chronological categories to distinguish those which are not even relevant to the issue and those that may be relevant.

- Post-NCAA Investigation articles: These are not relevant because they post-date the controversy and the internet web site defamation at issue as to these claims, and mainly involve this lawsuit.

- NCAA Investigation articles: These are not relevant because the Plaintiffs were under the NCAA gag order.

[97] • Pre-NCAA Investigation articles: These may be relevant to the issue of media access, but most only mention Cottrell or Williams in passing.

Thus, there is little relevant evidence demonstrating media access by the Plaintiffs, and the court erred in holding that Cottrell and Williams were limited purpose public figures. The order granting summary judgment to the NCAA on Cottrell's internet web site-related claims must be reversed, as must the directed verdict granted to the NCAA on William's claims.

B. Even if Cottrell and Williams Were Limited Purpose Public Figures, They Demonstrated Clear Evidence of Constitutional Actual Malice by the NCAA.

Even if this Court determines that the circuit court did not err in holding that Cottrell and Williams were limited purpose public figures, the summary judgment on Cottrell's internet web site claims and the directed verdict on such claims by Williams must be reversed because the Plaintiffs did present clear evidence of "constitutional" actual malice on the part of the NCAA relating to these admittedly false and defamatory statements. This standard, which was established for public officials in *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710 (1964), and extended to public figures in *Butts,* supra, requires that in order for a defendant to be liable to a public figure plaintiff on a defamation claim, the plaintiff

must demonstrate that [98] the defamatory statement was made with *knowledge* that it was false or with reckless disregard of whether it was true or not.

The NCAA defended the Plaintiffs' claims that are based on its internet web site publication of a Penalty Summary for the Alabama infractions case stating that Cottrell and Williams had been placed under eight-year "show cause orders" by asserting the testimony of NCAA employee Cheryl DeWees, who testified that the statements were published as a clerical error resulting from copying information relating to sanctions against the University of Kentucky. [R.2596] That alleged mistake, however, is not the entire story.

It is uncontested that at the time the NCAA made the false and defamatory statements that indicated Cottrell and Williams were under show cause orders, the NCAA had knowledge of the falsity of the statements because the Report on Infractions issued the same day did not contain any penalties against the Plaintiffs. [C.5709-32;7864-71] Thus, the publication was made by the NCAA with *knowledge* that the statement was false, the *New York Times* actual malice test is met by documentary evidence of record, and the NCAA's only possible argument to the contrary is that it was not aware that the false and defamatory publication had ever been made.

The problem with that assertion is that there is evidence demonstrating *wantonness* or *recklessness* on the part of the NCAA in [99] both making the publication and in its response when it was put on notice of the statements. First, no one at the NCAA headquarters, where there are over 300 employees, double-checked the February 1, 2002

publication on the internet web site Penalty Summary for errors, despite the material nature of such information. [R.2599] Second, the false statements on the Penalty Summary were not caught and corrected by the NCAA in September 2003 when the Summary was updated by the NCAA to add that the penalties against Alabama had been upheld on appeal, or many other times when the web page was entered by that NCAA employee, as outlined in the Statement of Facts, *supra*. [R.2598] Third, when finally notified by the Plaintiffs in October 2003 of the false statement error regarding the assertion of a show cause order against the Alabama recruiting coordinator, that statement was removed, but the Summary was not reviewed for other false statement and the additional defamatory statement therein that "employees" of Alabama had been placed under a show cause order was not corrected. [R.2602] This latter false statement was not removed from the Summary until October 2004, over two years from when it was first published, when the NCAA was again notified by Plaintiffs. [R.2604-05] The *repeated* failure of the NCAA to correct all these false statements regarding Cottrell and Williams, over period of February 2002 to October 2004, despite having been put on notice that it contained a falsehood, shows utter disregard [100] for the rights of the Plaintiffs. These actions are clear evidence of a reckless or wanton conduct regarding whether its publications regarding the Plaintiffs were truthful or not, such that even if the court did not err in holding the Plaintiffs were limited purpose public figures, the constitutional actual malice test was met and these claims should have been submitted to the jury.

IV. THE COURT ERRED IN GRANTING CULPEPPER'S MOTION FOR A NEW TRIAL – THE CASE SHOULD BE REMANDED FOR A JURY TRIAL ON THE EFFECT OF THE INDEMNITY AGREEMENT AND THEN A *HAMMOND* HEARING.

The jury in the case below brought back a verdict in favor of Plaintiff Cottrell and against Defendant Culpepper which awarded Cottrell $6 million in compensatory damages and $24 million in punitive damages. [R.3250;C.13934] Culpepper moved the court for a new trial and the motion was granted. [C.13895-96] The court's order stated that it had three reasons for granting the motion: that the $30 million verdict was "severely flawed" and "obviously the result of passion, bias, prejudice, and emotions," which would ordinarily be solved by a remittitur, but that (2) Culpepper was prejudiced by the court modifying its ruling on Cottrell's status after the close of the evidence to hold he was a private figure; and (3) that in the opinion of *Forrester v. WVTM TV,* 709 So.2d 23 (Ala.Civ.App. 1997), the Alabama Court of Civil Appeals "in effect changed the law" of slander by requiring proof of constitutional actual malice in any slander per se [101] case, as opposed to common law actual malice and that Cottrell's claim against Culpepper was allowed to go to the jury under the wrong standard. [C.13895-96] The circuit court, however, erred in granting a new trial; instead, this case must be *remanded* for further proceedings on the jury's verdict, including a jury trial on the effect of the Culpepper-NCAA indemnity agreement, and a subsequent *Hammond* hearing.

Appendix E

A. Culpepper Was Not Prejudiced by the Court's Ruling that Cottrell was a Private Figure.

The court erred in holding that it unduly prejudiced Culpepper when at the close of the evidence it changed its ruling on Cottrell's status from that of limited purpose public figure to a private figure. The ruling was plainly correct, and if there was any error in the court making the ruling when it did, it was merely harmless error. The claim of prejudice from Culpepper is based on a contention that he had defended the case by seeking to show that there was no proof of constitutional actual malice, rather than the lesser standard of common law malice. [C.13171-72] The problem with this argument is that Culpepper could *not* defend the claims against him by demonstrating that Cottrell could not show constitutional actual malice – that the defamatory statement was made with knowledge that it was false or with reckless disregard of whether it was true or not. This is because Culpepper's own testimony works against him. The statements he made regarding Cottrell that formed the basis of the claims submitted to the [102] jury involved indictable offenses relating to the abandonment of children and theft and, thus, were slanderous per se.[36] Then Culpepper admitted

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[102] [36] The evidence at trial demonstrated that Culpepper had made three different actionable false and defamatory statements: (1) that Cottrell had abandoned his family when he moved from Tallahassee to Tuscaloosa, (2) that Cottrell had stolen football player recruiting videotapes from the Alabama football offices, and (3) that that he had embezzled money from the Shaun Alexander Fund. Each is a crime under Alabama law. *See* Ala. Code 1975, §§ 13A-13-5 and 13A-8-1. Thus, the statements were defamatory per se because they imputed to Cottrell an indictable offense involving infamy or moral turpitude.

(Continued on following page)

at trial that in making the statements he had no knowledge of whether they were true or not, but was merely repeating what others had told him. [R.1165-66,1170] Moreover, Culpepper admitted that he had made the statements to media persons. [R.1191-92] **The combination of such facts – making slanderous per se statements about Cottrell to many people, including media persons, without knowing whether they were true of false – is surely evidence of reckless disregard for whether the statements Culpepper made were true of false.** Culpepper's own admissions were evidence of constitutional actual malice. Thus, even if the circuit court had not modified its ruling to hold Cottrell a private figure, but kept him categorized as a limited purpose public figure, the constitutional actual malice standard did *not* provide Culpepper a good defense. Any error by the circuit court was merely harmless error and a new trial was improperly granted to Culpepper.

[103] B. The Court of Civil Appeals Opinion in Forrester v. WVTM TV, Inc., 709 So.2d 23 (Ala.Civ.App. 1997) Did Not Change Any Legal Standards.

The circuit court's order on Culpepper's motion for new trial stated that the court had erred by not following a new legal standard for claims of slander per se, as the court believed was established by the Alabama Court of Civil Appeals in *Forrester, supra*. This ruling is erroneous as a matter of law. First, the Court of Civil Appeals is

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Sunshine Investments, Inc. v. Brooks, 642 So.2d 408, 410 (Ala. 1994); *Anderton v. Gentry*, 577 So.2d 1261, 1262 (Ala. 1991).

bound to follow the rulings of the Alabama Supreme Court and United States Supreme Court and simply does not have the authority to *change* the law. This particularly true with regard to defamation law where the opinions of the United States Supreme Court applying the First Amendment to the United States Constitution are controlling. *New York Times Co.*, 376 U.S. at 283, 84 S.Ct. at 727. Thus, the *Forrester* opinion could *not* have set a new standard of proof in a slander per se case, as the circuit court mistakenly believed.[37]

Second, the court clearly erred in its reading of the *Forrester* opinion, which did *not* create, either explicitly or implicitly, a new legal standard applicable to claims based on slander per se. What *Forrester* involved was not a case of defamation per se, but the public disciplining of a child at a children's sporting event, which the Court [104] of Appeals held was a matter of public concern. 709 So.2d at 26. The circuit court's first error was in making the leap of logic that "[i]f disciplining a child is a matter of public concern, then a felony offense must be a matter of public concern."[38] [C.13895] The circuit court then went even further with its erroneous analysis to state:

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[103] [37] Moreover, the *Forrester* opinion has not been cited by this Court or the Court of Civil Appeals in the nearly 10 years since it was decided, which is highly unusual for an opinion that is said to "change the law."

[104] [38] Whether speech is a matter of public concern is determined as a matter of law by the court based upon its content, form, and context. *Connick v. Myers*, 461 U.S. 138, 147-48 n.7, 103 S.Ct. 1684, __ (1983).

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> The law has always been, that slander per se can be proven by proof of common law malice. However, if the defamatory statement relates to a matter of public concern, then actual constitutional malice must be proven. **The Court of Civil Appeals, in effect changed the law, to require proof of actual constitutional malice in any slander per se case.**

[C.13895] (emphasis added). Thus, the circuit court apparently reasoned that since an allegation of a felony is also slander per se, that all slander per se must be a matter of public concern and require proof of constitutional actual malice. That holding, based on a tortuous interpretation of a Court of Civil Appeals opinion, is not supported by citation to any other legal authority. Moreover, it is plainly in contradiction of this Court's ruling in *Nelson v. Lapeyrouse Garin Corp.*, 534 So.2d 1085, 1096 (Ala. 1988) that the defamatory statement that the plaintiff had stolen from his employer was a matter of *private* concern. What the circuit court did by its erroneous reasoning is take slander per se, a defamation claim with a lower burden of proof designed to protect a private figure plaintiff's reputation by [105] providing presumed damages, and transformed it into a claim with a higher burden of proof designed to protect the defendant speaker. Accordingly, it should be clear that the circuit court erred as a matter of law in its interpretation of *Forrester*, an issue on which this Court has de novo review. The circuit court's order granting Culpepper a new trial must be reversed.

C. This Court Should Order that Following Remand, a Jury Trial Should be Held on the Effect of the Culpepper – NCAA Indemnity Agreement Before a *Hammond* Hearing.

Once this Honorable Court holds that the circuit court erred in granting Culpepper's motion for new trial, this cause will be remanded for further proceedings regarding the judicial review of the compensatory and punitive damages awards against Culpepper. Because the issue of whether Culpepper is indemnified by the NCAA as to the verdict against him will be important in the *Hammond* hearing review of the punitive damages award,[39] that determination will need to be made prior to the hearing. However, because the indemnity agreement is at least ambiguous, if not wholly clear that it applies to the verdict in [106] this case, its meaning [sic] affect will need to be determined by a jury.[40] This much was admitted by NCAA General Counsel Elsa Cole when in her deposition she stated that whether the indemnity agreement covered the

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[105] [39] This Court has held that the existence and amount of insurance coverage of a defendant is a relevant factor for consideration by a court on review of a motion for remittitur of punitive damages. *Cooper & Co.*, 832 So.2d 628, 644 (Ala. 2001) (quoting with approval the relevant text of the lower court's order.). Similarly, the Florida Court of Appeals held in *Humana Health Ins. Co. of Fla. v. Chipps*, 802 So.2d 492, 497-98 (Fla.Ct.App. 2001), that where, such as here, a defendant argues that a large punitive damage award will cause great financial injury or bankruptcy, the existence of an indemnity agreement becomes relevant for proving otherwise.

[106] [40] It is hornbook law that whenever a contract is ambiguous in any respect the true meaning is a question of fact for the jury. *Woodruff v. Leighton Ave. Office Plaza, Ltd.*, 622 So.2d 304, 307 (Ala. 1993) (holding that a question of fact precluded summary judgment on the meaning of an indemnity agreement.").

verdict in this case was dependent on the facts. [C.13701-08]

Thus, Cottrell asks this Court to order the circuit court to hold a jury trial regarding the effect of the Culpepper-NCAA indemnity agreement prior to judicial review of the punitive damages award.[41] Cottrell moved the circuit court for a jury trial on this issue [C.13884-13894], but the motion was found by the circuit court to be moot when the court granted Culpepper's new trial motion. To prevent any further errors, this Court should instruct the circuit court that such a limited jury trial is required.

V. THIS COURT MUST ORDER JUDGE WILSON TO PERMANENTLY RECUSE.

In December 2005, subsequent to Judge Wilson's filing of a complaint against one of Plaintiff's counsel with the Alabama Bar Association (this document is contained with Exhibit 2 to this brief), [107] the Plaintiffs moved Judge Wilson to recuse or disqualify himself from the further proceedings of this case. [C.13966-14036] That motion was not ruled upon until August 7, 2006, when Judge Wilson wrote a letter to the presiding judge of the Tuscaloosa Circuit Court stating that he was "temporarily recus[ing]

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[106] [41] Alabama law recognizes that there may be a jury trial on the meaning of a provision in a contract separate and apart from the trial on the merits of the claims at issue in a complaint. *See, e.g., Shearson Bros. v. Crisp,* 646 So.2d 613, 617 (Ala. 1994) (recognizing right to jury trial on issue of whether written agreement to arbitrate included agreement to have an arbitrator decide issues of arbitrability when there are questions of fact on that issue.).

himself." Exhibit 3. Plaintiffs ask, as a part of the relief requested in this appeal, that Judge Wilson be ordered to *permanently* recuse or be disqualified from this case.[42] Plaintiffs' recusal motion outlined numerous grounds for his recusal/disqualification that need not be repeated here, but are incorporated as if fully set out herein. [C.13966-14036]

Canon 3.C.(1)(a) of the Alabama Canons of Judicial Ethics requires recusal of a judge when his or her impartiality may be questioned, including when he or she may have a personal bias or prejudice. Here, it is simply sufficient to point out that Alabama law has established that once a judge has filed a bar complaint against an attorney, the judge must recuse himself or herself in that case because the bar complaint is evidence of bias against the attorney.[43] This situation is [108] additionally complicated by the Judicial Inquiry Commission complaint filed by one of Plaintiffs' counsel, adding weight to the question of a possible lack of impartiality.

Judge Wilson's letter to the presiding judge stated his temporary recusal would last until the resolution of his Bar complaint and the Judicial Inquiry Commission

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[107] [42] If this appeal brief is not the proper manner in which to raise the issue before Your Honors, Plaintiffs ask that their argument be treated as presented as a mandamus petition or whatever the proper procedural vehicle would be.

[107] [43] *See Ex parte Rollins*, 495 So.2d 636 (Ala. 1986) (it was an abuse of discretion for the circuit court judge not to recuse himself once he filed a bar complaint against an attorney in the case); *Ex parte Robert B. Eubank*, 871 So.2d 862 (Ala.Crim.App. 2003) (circuit judge was ordered to recuse after filing bar complaint against an attorney defending himself pro se in a DUI case).

complaint against him, and then he would decide whether his recusal would be permanent. Exhibit 3. Judge Wilson's reasoning, however, is faulty, because the resolution of those matters, no matter how decided, cannot undo the appearance of bias nor erase the question of whether he can be impartial that was created by his Bar Complaint against Plaintiffs' counsel Gallion and the other matters found in Exhibit 3. Accordingly, Your Honors should order Judge Wilson to *permanently* recuse himself in this matter.

VI. CONCLUSION.

Plaintiffs Cottrell and Williams have come to this Court in order to find justice and perhaps recover their good reputations. Before the briefing to Your Honors is completed, this litigation will have taken almost five years. During that time the Plaintiffs have found no relief in our state justice system for the wrongs committed against them by Culpepper and the NCAA. The Defendants' misconduct caused the Plaintiffs to suffer a fall from being respected Division I-A college [109] football coaches with bright futures to outcasts in their profession, reduced to coaching at lesser positions at half their former salaries and with no opportunity for advancement.

The facts of this case demonstrate that the Plaintiffs are the victims of a conspiracy designed to bring down the Alabama football program, where they were simply victims of a much larger scheme. The evidence demonstrates that the NCAA violated its own confidentiality bylaw that it enforced upon the Plaintiffs as a gag order, leaving them to stand mum before the media while the NCAA Defendants and Culpepper leaked information to the media which

defamed them and cause them to be portrayed in a false light. The NCAA also published false and defamatory statements on its internet web site, which it knew were false, and then showed reckless disregard of the Plaintiffs by not removing the statements for as long as nearly three years. Finally, the evidence demonstrates that Culpepper bore great personal malice toward the Plaintiffs, especially Cottrell, and that his defamatory statements about them were made with the specific intent that they be forced out of coaching college football.

One theme has repeated throughout this case, from the formation of the conspiracy in 1998, and continuing through the NCAA investigation and this lawsuit. That theme is this: As far as the NCAA is concerned, the rules are for the other fellow, but not it. This is true as to [110] following the NCAA bylaws, and it is true as to the Alabama rules of court where this case has seen ex parte "crib sheets" for the trial judge and ex parte in camera review of documents. This Court's duty now, based on the law, the facts, and precepts of justice and equity, is to hold the NCAA and Culpepper accountable. No man, and no organization, no matter how powerful or aloof, is above the law.

Accordingly, Cottrell and Williams ask this Court for the following relief: (1) reversal of the trial court order granting Culpepper's motion for a new trial and reinstatement of the jury's verdict; (2) an order remanding this cause to the trial court for a jury trial on the meaning and effect of the indemnity agreement between Culpepper and the NCAA, with judicial review of the compensatory damages award and a *Hammond* hearing on the punitive damages award; (3) a reversal of the trial court order entering judgments as a matter of law in favor of the

NCAA, Thomas Yeager, and Richard Johhaningmeier [sic] on Cottrell and Williams claims, so that the claims go to trial; (4) a reversal of the trial court order granting judgments as a matter of law in favor of Tom Culpepper on Williams' claims, so that they go to trial; and (5) and an order directed to Tuscaloosa Circuit Court Judge Thomas Wilson that his recusal in this matter must be permanent and final, rather than simply temporary.

Date: September 15, 2006.

[111] RESPECTFULLY SUBMITTED,

_____

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Appendix E

[112] **CERTIFICATE OF SERVICE**

I hereby certify that I have served the foregoing brief and corresponding exhibits upon all counsel of record, as indicated below, by placing a copy of the same in the United States mail, postage prepaid and properly addressed, this the 15th day of September, 2006.

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Appendix F

APPENDIX F – CORRECTED REPLY BRIEF OF APPELLANTS/BRIEF OF CROSS-APPELLEES FILED NOVEMBER 21, 2006

IN THE SUPREME COURT OF ALABAMA

Nos. 1041858, 1050436 & 1050437

RONALD W. COTTRELL AND IVY WILLIAMS,

Appellants,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, TOM CULPEPPER, ET AL.,

Appellees.

On Appeal from the Circuit Court Of Tuscaloosa County, Alabama, No. CV-03-810.

***Corrected* REPLY BRIEF OF APPELLANTS/BRIEF OF CROSS-APPELLEES**

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[1] SUMMARY OF THE ARGUMENT

This is a case about two former assistant football coaches for the University of Alabama whose professional reputations and careers were ruined when their lives crossed paths with a conspiracy to bring NCAA sanctions upon the Alabama football team. The appeals involve complex facts and legal questions. The key legal issue is whether Plaintiffs Ronnie Cottrell and Ivy Williams are limited purpose public figures or private figures as to their defamation claims against the NCAA Defendants and Defendant Culpepper. Although the Defendants give "lip service" to *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997 (1974), and other landmark opinions of the United States Supreme Court which establish the standard by which a person is judged a private figure or a limited purpose public figure, they primarily focus their argument on why they believe the Plaintiffs should be held to be limited purpose public figures. They argue that the Plaintiffs are limited purpose public figures because they

entered into careers in sports and took coaching jobs at a high-profile college football program like Alabama, and because they were involved in the NCAA investigation of Alabama, which received much public attention. These arguments fail because they are based upon legal concepts that have been rejected by the United States Supreme Court. In *Time, Inc. v. Firestone*, 424 U.S. 448, 96 S.Ct. 958 (1976), the Court rejected the [2] concept of categorizing persons as limited purpose public figures based upon subject matter classifications, and also rejected the *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811 (1971), test of categorizing persons as limited purpose public figures based upon the defamatory speech being related to a matter of public interest. Instead, when this Court performs the more exacting analysis of the facts to the appropriate legal standards it will hold that the Plaintiffs are private figures as to all their claims.

That ruling, in turn, lowers the Plaintiffs' evidentiary burdens and requires that the rulings of the trial court which granted judgments as a matter of law in favor of the Defendants be reversed. Alternatively, even if the Plaintiffs are found to be limited purpose public figures as to any claims, the trial court erred in holding that they did not meet their burden of showing clear and convincing evidence of "actual malice" on the part of the Defendants.

The trial court allowed Cottrell's defamation claims against Culpepper to go to the jury based upon certain slanderous per se statements Culpepper made about him to several people. At least one of these statements was made to NCAA investigator Richard Johanningmeier and placed into the record of the NCAA investigation. The jury returned a verdict in favor of Cottrell for $6 million in

compensatory damages and $24 million in punitive damages. While the court denied [3] Culpepper's post-judgment motion for a judgment as a matter of law, and then granted his motion for a new trial, the latter ruling was in error because there were no errors that required a new trial, and the verdict can undergo normal, post-verdict judicial review. Additionally, though not conclusively reached by the trial court, this Court should rule that the Culpepper-NCAA indemnity agreement is applicable to the jury verdict because, in accord with the language of the agreement, the verdict is based at least in part upon a defamatory statement that Culpepper made regarding Cottrell to the NCAA, or in the alternative instruct the trial court to hold a jury trial on the issue. Finally, this Court must order Judge Wilson to recuse himself from further proceedings based upon his filing of a bar complaint against one of Cottrell's trial counsel, which creates an impermissible appearance of bias.

ARGUMENT

"Now where do I go to get my reputation back?"
Ray Donovan, U.S. Secretary of Labor, 1987

I. INTRODUCTION.

The Plaintiffs opened the Argument section of their original brief by quoting the above rhetorical question from Ray Donovan, made when he was acquitted of federal larceny and fraud charges, after he had been already judged guilty by the news media. Plaintiffs Ronnie Cottrell and Ivy Williams, formerly assistant coaches at the University of Alabama, received the same rough treatment during the NCAA [4] investigation of Alabama that began in 2000. That investigation, and the subsequent penalties

announced in February 2002, were the product of the efforts of a conspiracy of persons such as University of Tennessee coach Phillip Fulmer and Defendant Tom Culpepper to bring NCAA sanctions against Alabama. The "fall guys" for the efforts of this conspiracy were Cottrell and Williams, who both had successful college football coaching careers, but who are now relegated to obscurity coaching a high school football team in rural Alabama.

The Plaintiffs were injured by defamatory statements that Culpepper made about them to anyone who would listen, and by the actions of the NCAA and others in leaking false information to the news media and in publishing false and defamatory statements about them on its internet web site. The lawsuit against these Defendants has been bittersweet. Cottrell was awarded a substantial verdict by a Tuscaloosa County jury, raising Plaintiffs' hopes, only to have the trial court judge order a new trial on Cottrell's defamation claim against Culpepper.

The appeals by Cottrell and Williams, and cross-appeal by the NCAA raise numerous issues to this Honorable Court. The major issues are: (1) whether, as to each claim, the Plaintiffs are limited purpose public figures or private figures, which controls the Plaintiffs' burden of proof, (2) whether the Plaintiffs had to prove their claims [5] by showing constitutional actual malice, or simple negligence, (3) whether the defamatory statements that Culpepper made about the Plaintiffs were defamatory per se and whether they touched on a matter of public concern, and (4) whether the Culpepper-NCAA indemnity agreement applies to the jury verdict rendered below. In their original appeal brief, Cottrell and Williams attempted to set out the lengthy and complex facts of the

case, describe the unusual course of the trial court proceedings, and present legal argument in support of their positions on appeal, such that may ultimately be able to restore their good reputations.

However, the response briefs of the Defendants paint a much different picture than that seen by Cottrell and Williams. A theme that is apparent in the briefs, especially that of the NCAA Defendants, is that of arrogance, that it need not be held to account for the injury caused to Cottrell and Williams. Although Cottrell and Williams were *not* found to have played any role whatsoever in the payment of money to a Memphis, Tennessee high school football coach by an Alabama "booster," the Defendants attempt to portray them as blatant rules violators "involved"[1] in an "infamous recruiting scandal." NCAA brief, at 1.

[6] This arrogance is the natural product of a system where the NCAA is itself the investigator, the prosecutor, the judge, and the jury with regard to its member institutions and their coaches, where secrecy is protected at all

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[5] [1] Given the NCAA decision to drop all allegations in its Letter of Inquiry that Cottrell and/or Williams took part in or had knowledge of the payment of money to a high school coach by an Alabama "booster" to gain prize recruit Albert Means, the truth is that the only "involvement" that they had with the so-called "recruiting scandal" was being at the wrong place at the wrong time by being involved in recruiting high school football players to attend Alabama. Cottrell was *not* involved at all in Means' recruitment. Gene Marsh, one of Alabama's representatives in the investigation, testified that Cottrell was *not* involved in Means' recruitment. Marsh testified:

> Q: Was Ronnie Cottrell in anyway connected to the Albert Means recruitment?
>
> A: Never, huh-huh. No.

[R.2855]

costs, where the identity of witnesses may be kept confidential, and where hearings are held and penalties against public institutions are meted out behind closed doors. NCAA brief, at 15-19. With this system, the NCAA is free to create the facts it needs to justify the result it seeks. With this system, the NCAA is free to bring outlandish claims against college coaches based upon "evidence" that would be inadmissible in a court of law, to which such coaches cannot publicly respond because of the threat of an unethical conduct charge under Bylaw 32.1.4. Given this system, it is thus unnatural for the NCAA to be challenged in the manner in which it has in the case below and on appeal now before this Honorable Court. Thus, in reading the brief of the NCAA this arrogance is expressed when it demands to be [7] found correct at all times, even when it takes opposing sides of an issue or fact within the same brief. For example:

- The NCAA notes that its member institutions and their athletic coaches are bound by its bylaws, NCAA brief at 15-16, and that the bylaws require its investigation to remain "in the strictest confidence," *id.* at 18; but then later contends in opposition to Cottrell and Williams' argument that the prohibition on media access during the investigation required under Bylaw 32.1.4 prevented them from being held "public figures" for that period of time, that the coaches were free to speak out but simply "chose not to use their media access." *Id.* at 80-81. This argument is appalling in its arrogance.

- The NCAA argues extensively that Cottrell and Williams, particularly Cottrell, were widely known statewide and nationally to sports fans as coaches at Alabama, *id.* at 21-23, that there was

"widespread public interest in the actions of Cottrell and Williams in particular, as well as the NCAA investigation of Alabama in general," *id.* at 87; but then also contends that no one reading the Major Infractions penalties summary on its website about the NCAA sanctions against Alabama would recognize that the only coaches mentioned, "Alabama assistant coach A" and "coach B," were references to Cottrell and Williams. *Id.* at 35, fn. 13.

[8] • Defendant Culpepper argues in one place that the defamatory statements he made involved matters of public concern because, he says, they related to his character and fitness for his coaching job at Alabama, Culpepper brief, at 85-88, yet contradicts himself by failing to acknowledge the case law holding that statements against one's fitness for their job are slanderous per se.

The NCAA Defendants and Tom Culpepper cannot be allowed by this Honorable Court to take two sides of these and other issues.

II. RESPONSE TO THE DEFENDANTS' ASSERTIONS OF MISSTATED FACTS AND PROCEDURAL HISTORY IN COTTRELL AND WILLIAMS' ORIGINAL BRIEF.

Both the NCAA Defendants and Tom Culpepper contend that Cottrell and Williams' original brief to this Court contains misstatements of fact and events that occurred during the litigation below. Cottrell and Williams, and their counsel, take issue with these contentions, and address the most critical ones below. These

types of issues were noted in the Statement of the Case of Plaintiffs' original brief to give this Court a flavor for the entirety of the underlying proceedings so it can view the appellate issues in the proper context.

A. The Failure of the Trial Court to Order Production of the Culpepper-NCAA Settlement Agreement before Trial.

The NCAA contends that Plaintiffs have made misleading statements to this Court about the trial court's failure to order production of the Culpepper-NCAA settlement agreement (with its indemnity provision) [9] before trial, and say that Plaintiffs have not explained how it was discoverable or admissible evidence for the trial.[2] The document was plainly discoverable pursuant to Rule 26(b)(2), Ala.R.Civ.P., which provides for the "discovery of the existence and contents of any insurance agreement" which could satisfy a judgment or "indemnify or reimburse" payment of the judgment. Plaintiffs wanted to use the agreement at trial to prove bias and for potential witness impeachment. [R.576-79, 589-94] Thus, the document would have been admissible under Rule 408, Ala.R.Evid., which "does not require exclusion of evidence offered . . . for proving bias or prejudice," as well as Rule 616, Ala.R.Evid., regarding impeachment by evidence of bias.

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[9] [2] The NCAA states that the document was inadmissible under Rule 406, Ala.R.Evid. NCAA brief, at 9. However, Rule 406 relates to the issue of habit, and routine practice, and it is confusing as to why the NCAA believes this evidentiary rule would make the document inadmissible.

B. The *In Camera* Review of the Settlement Agreement.

Both the NCAA defendants and Culpepper contend that the statement in the Plaintiffs' brief that their counsel attended the trial court's *in camera* inspection is false. That assertion is based on the impression given by the court in speaking to Plaintiffs' trial counsel when the court stated: "The Plaintiffs are seeking to discover a document which the Court had been keeping under seal since *we* previously had an *in camera* inspection." [R.3528] Plaintiffs [10] interpreted the use of "we" to include the court *and* the counsel for the parties to the agreement, as there is evidence of *other* ex parte contact between the NCAA and the trial court such as a "crib sheet" explaining why the NCAA should be granted summary judgment. [C.5943-55]; *see* Original brief, at 5, fn.3. However, the NCAA's brief *avoids* responding to this assertion of improper contact.

C. The Prematurity of the Trial Court's Ruling on Summary Judgment.

The NCAA contends that the Plaintiffs' brief presents a distorted view of the circumstances surrounding the trial court's entry of its summary judgment order. During the June 23, 2005 hearing on the Defendants' motions for summary judgment, the Plaintiffs asked the court for the opportunity to depose Cheryl DeWees, the NCAA employee responsible for the NCAA internet web site defamations, in order to submit the deposition in opposition to a summary judgment. [R.448-50, 566-68] The court agreed to this. [R.569] The trial court then stated that it would issue an order on the summary judgment motions as late as the

first day of the upcoming trial, but would allow the DeWees deposition, and the deposition of another NCAA employee Shep Cooper, who both sides wanted to depose, to be submitted before his ruling. ("That's fine. Submit both of them.") [R.570-72]

Plaintiffs' counsel then made plans to take DeWees' deposition on Friday, July 1, 2005 and to take Shep Cooper's on Wednesday, July 6. [11] [C.12557-59] However, on July 5, the NCAA's counsel requested that Cooper's deposition be delayed and taken on Friday, July 8, instead, because of alleged scheduling problems for Cooper. Plaintiffs' counsel agreed, based upon the court reporter's promise that the judge would be able to get a copy of the transcript to review before ruling on summary judgment. Unexpectedly, on Thursday, July 7, the court issued its order on the summary judgment motions, without the benefit of the DeWees and Cooper depositions. [R.616] The next day the court agreed to consider the depositions in relation to the summary judgment motions. [R.658-59] The Court eventually reviewed the DeWees deposition transcript and re-affirmed its previous order, but never reviewed the Cooper deposition. [C.12949] The failure to do so was plainly in contradiction of the Court's earlier statement.

III. THE UNITED STATES SUPREME COURT'S PRECEDENT ON THE DIFFERENCE BETWEEN PRIVATE FIGURES AND "LIMITED PURPOSE" PUBLIC FIGURES SHOWS THAT COTTRELL AND WILLIAMS WERE PRIVATE FIGURES.

In their original brief, Cottrell and Williams argued that they did *not* meet the test for a limited purpose public

figure set out by the United States Supreme Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997 (1974), *Hutchison v. Proxmire,* 443 So.2d 111, 99 S.Ct. 2675 (1979), and *Time-Inc. v. Firestone,* 424 U.S. 448, 96 S.Ct. 958 (1976), as to any of their claims, and that to the extent the trial court held differently it was in error. However, both the NCAA [12] Defendants and Culpepper are highly critical of the Plaintiffs' defamation case law analysis, which focuses in large part on the fact that the Plaintiffs had no activity in actual *public* controversy regarding the NCAA investigation because they were under the NCAA's "gag order." While relying on many of the same Supreme Court opinions as the Plaintiffs, the NCAA Defendants surprisingly contend that the gag order is irrelevant because, it says, the coaches both met the test for limited purpose public figures "long before the NCAA investigation began" simply by virtue of the [sic] their position as assistant coaches at a prominent football program like the one at Alabama. NCAA brief, at 62-68. Even though Culpepper also relies primarily on United States Supreme Court case law, he argues Cottrell and Williams have wrongly ignored this Court's own opinions on defamation law, Culpepper brief, at 47, 50, and he further argues, like the NCAA, that Cottrell and Williams became limited purpose public figures when they voluntarily became assistant coaches in college football. *Id.* at 49-50, 61-62, 84-88.

However, the Defendants' arguments are *improper* because, as explained further below, it has *never* been argued that Cottrell and Williams were general purpose public figures (like someone such as Paul "Bear" Bryant), and the issue of whether they are limited purpose public figures *cannot* be determined separate from the context of the public controversy at issue, which in this case is the

NCAA invest-[13]igation of Alabama that began publicly in November 2000.

Apparently, the Defendants want this Court to view the "public controversy" around which the limited purpose public figure test is to be focused on by this Court as the broader, much-debated "Monday morning quarterbacking" of the Alabama football program as a whole,[3] rather than what is actually proper for this case in the much narrower issue of the NCAA investigation of Alabama that became a public controversy in November 2000. The Defendants take this approach because they wish to make it appear that Cottrell and Williams voluntarily thrust themselves into the Alabama football program by accepting coaching jobs, and became limited purpose public figures at that time. This analysis is plainly incorrect.

The only public controversy at issue in this case is the NCAA investigation relating to the alleged payment of money to a high school coach by an Alabama "booster," and when the relevant facts are analyzed under the legal standards established by the landmark cases of [14] defamation law, it becomes readily apparent that the trial court's holdings were *incorrect*. Cottrell and Williams are

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[13] [3] The Defendants apparently want this Court to follow the subsequently rejected reasoning used in the plurality opinion of *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811 (1971), where the *New York Times* "actual malice" standard would apply in all defamation cases regarding a matter of public interest or concern *regardless* of the nature of the plaintiff as a private figure. That reasoning was subsequently *rejected* by the Supreme Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997 (1974) and its progeny. Thus, the public interest generally in the Alabama football program referred to the Defendants' briefs simply does *not* make Cottrell and Williams limited purpose public figures.

simply *not* limited purpose public figures as to the NCAA investigation controversy because the facts demonstrate that: (1) they did *not* voluntarily thrust themselves into the NCAA investigation of Alabama's recruitment of high school player Albert Means in order to influence its outcome, but were involuntarily pulled into it by the NCAA, (2) they, had little or no influence on its outcome, as they were *not* the focus of it,[4] and (3) they had *no* media access at all during the NCAA investigation because of the NCAA "gag order", and the degree of access they had prior to the NCAA investigation was hardly noteworthy as they were only assistant coaches.

A. "Limited Purpose" Public Figures: A History of How the United States Supreme Court Established this Category of Defamation Plaintiff.

While the NCAA Defendants and Culpepper have cited and discussed a multitude of defamation cases from many courts, their arguments tend to confuse the basic issues rather than provide enlightenment regarding the proper legal test for when a person is to be considered a "limited [15] purpose" public figure. As this Court is aware, First Amendment defamation law first involved

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[14] [4] The focus of the NCAA investigation was on Alabama booster Logan Young and his alleged payment of $150,000 to Memphis, Tennessee high school football coach Lynn Lang so that Lang's star player Albert Means would accept an athletic scholarship to play football at Alabama, such that the active participants in the public controversy attempting to influence its outcome were Young, Lang, and the "whistleblower," assistant high school football coach Milton Kirk who was the first to speak publicly about what had occurred.

only "public officials," *see* ***New York Times v. Sullivan*****, 376 U.S. 254, 84 S.Ct. 210 (1964)**, then was applied to "public figures." ***Curtis Publishing Co. v. Butts*****, 388 U.S. 130, 87 S.Ct. 1975 (1967)**.

1. Development of the *Gertz* Standard for a "Limited Purpose" Public Figure.

The United States Supreme Court was thereafter faced with the question at issue here – what is the appropriate legal standard to apply in a defamation case where the plaintiff is not a public official nor obviously a public figure? In ***Gertz v. Robert Welch, Inc.*****, 418 U.S. 323, 351, 94 S.Ct. 2997, 3013 (1974)**, the Court ultimately determined that there were *two* different types of public figures,[5] one who "occupy positions of such pervasive power and influence that that they are deemed public figures for all purposes," and a second one who becomes a public figure in relation to a particular controversy by voluntarily "thrust[ing] themselves to the forefront of particular public controversies in order to influence the resolution of the issues [16] involved." 418 U.S. at 345. The first type of public figure, of course, is the "general purpose" public figure established by the Court in *Curtis Publishing, supra,* while the second type, the "limited

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[15] [5] In *Gertz*, the Supreme Court also briefly mentioned the possibility of a third type of public figure when it stated: "Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but instances of truly involuntary public figures must be *exceedingly rare*." 418 U.S. at 345, 94 S.Ct. at 3009 (emphasis added). This person would be deemed an "involuntary, limited purpose" public figure. This truly "rare" type of limited purpose public figure is addressed further below in section III.A.1.a.

purpose" public figure, or "voluntary, limited purpose" public figure, was a new judicial creation. **The Court stated that in order to recognize this latter type of public figure, the court should "look[ ] to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation."** *Id.* at 352.

The facts of the *Gertz* case and the Supreme Court analysis of them provide an example of how the above standard should be applied by the lower courts. The case involved an attorney, Elmer Gertz, who had been characterized in a magazine established by the John Birch Society as a "Lenninist," a "Communist-fronter," and other similar false statements for his representation in a civil lawsuit the family of a boy who had been killed by a police officer. *Id.* at 325-26. The magazine publisher defended the claim by arguing that as an attorney Gertz was either a public official or a public figure, that the article in question concerned "an issue of public interest," and that the legal standard for a defamation claim by such persons set forth in the *New York Times* case was applicable. *Id.* at 327. At trial, the court concluded that the *New York Times* standard would only apply to Gertz if he was a public official or public figure, "discounting the argument that a [17] privilege would arise from the presence of a public issue." *Id.* at 328. The trial court then held that Gertz was neither a public official nor a public official. *Id.*

However, after a verdict in favor of Gertz, the trial court entered a verdict in favor of the defendant based upon a conclusion that the *New York Times* standard would apply even when the plaintiff was not a public official or a public figure, because the article involved an

issue of public interest. Id. at 329. Gertz appealed, and the Court of Appeals affirmed. *Id.* On certiorari review, the Supreme Court *rejected* the idea that Gertz could be held to be a limited purpose public figure based simply upon the fact that he had been involved in an issue of public interest. *Id.* at 346. The Supreme Court then set out to determine whether Gertz would be considered a limited purpose public figure based upon other factors.

> Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual shall not be deemed a public personality for all aspects of his life. It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the controversy giving rise to the defamation.
>
> **In this context it is plain to see that [Gertz] was not a [limited purpose] public figure.** He played a minimal role at the coroner's inquest, and his participation related solely to his representation of a private client. He took no part in the criminal prosecution of Officer Nuccio. **Moreover, he never discussed either the criminal or civil litigation with the press and was never quoted as having** [18] **done so. He plainly did not thrust himself into the vortex of this public issue, nor did he engage the voter's public attention in an attempt to influence its outcome.** We are persuaded that the trial court did not err in refusing to characterize petitioner as a public figure for the purposes of this litigation.

Id. at 352 (emphasis added). The Supreme Court reversed the ruling, and ordered a new trial because of certain damages issues. *Id.*

a. The NCAA Defendants' Argument for an "Involuntary" Public Figure is Not Supported by the Weight of the Case Law.

While *Gertz* was the seminal opinion on the issue of the limited purpose public figure, and still remains the key opinion to this day, Culpepper's appeal brief does *not* discuss or even cite to the opinion. While the NCAA Defendants do discuss *Gertz*, they provide a *misleading* analysis. The NCAA contends that Cottrell and Williams read *Gertz* too narrowly, and the NCAA attempts to portray the opinion as holding that the degree to which a defamation plaintiff voluntarily thrust himself into a public controversy is not really important, because it says that *Gertz* holds that plaintiffs may became public figures involuntarily and that persons need not "thrust themselves" into a controversy. NCAA brief, at 60-61. This is simply *not* true.[6]

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[18] [6] In footnote 19 of their brief, the NCAA Defendants cite several cases for the proposition that a person may become a limited purpose public figure *without* thrusting themselves into a controversy. **However, these cases, hidden in a footnote, do *not* truly support the proposition for which they are cited.** For example, *Finebaum v. Coulter*, 854 So.2d 1120, 1123 (Ala. 2003), involved an alleged defamation against Coulter, [19] an admitted "'a public sports figure and analyst and sportscaster for . . . seventeen to eighteen years. . . .'" The NCAA cites to page 1129 of the opinion for the proposition that Coulter was held by this Court to be a limited purpose public figure, but no such holding is actually present on that page. Instead, this Court

(Continued on following page)

held that Finebaum's speech was protected by the First Amendment based on the conclusion that it was "rhetorical hyperbole." 854 So.2d at 1129. Moreover, based upon the facts of the case, particularly Coulter's great access to the media as a long-time radio sportscaster, he could also have been held to be a general purpose public figure.

The case of *White v. Mobile Press Register, Inc.*, 514 So.2d 902, 903 (Ala. 1987), cited by the NCAA, involved a plaintiff who was a former administrator for the federal Environmental Protection Agency, who then became an officer in a company involving the transportation of hazardous waste for disposal in Alabama. This Court held that the plaintiff, a former public official who then voluntarily placed himself in a situation "subject to much public interest and concern," by becoming a "high level executive" in the hazardous waste industry was a limited purpose public figure. 514 So.2d at 904. Thus, this Court *did* hold that the plaintiff in *White* had become a public figure voluntarily by thrusting himself into a public controversy, and the NCAA falsely describes the holding of the *White* case.

The case of *Dameron v. Washington-Magazine, Inc.*, 779 F.2d 736 (D.C. Cir. 1995), cited in the NCAA's footnote 19, does happen to involve one of the rare instances in the case law where a court has found a defamation plaintiff to be an involuntary limited purpose public figure. However, as is discussed in footnote 6 and other text below, the number of such cases in the case law over the past forty years is so few that they, apparently, can be counted on one hand.

The NCAA also cites this Court to *Barry v. Time, Inc.*, 584 F.Supp. 1110, 1118 (N.D. Cal. 1984), where the plaintiff had taken the *head* basketball coaching job at a university where two previous head coaches had recently been fired for violating NCAA rules in recruiting players, and then became enveloped in allegations additional recruiting violations. The court held that Barry was a limited purpose public figure because by accepting a head coaching position where there was an "*already existing* public controversy regarding alleged recruiting violations" was a sufficient voluntary act to thrust himself into "the center of public attention" regarding a "continuing public controversy." 584 F.Supp. at 1118. These facts are much different from the present case, where Cottrell and Williams were only assistant coaches, not head coaches, and no controversy involving NCAA recruiting violations was existing at Alabama when they accepted their coaching positions in the 1990's.

[20] The NCAA argues that a person "can become a limited-purpose public figure voluntarily *or involuntarily*." *Id.* at 61 (emphasis added). However, it then cites this Court to only *one* case where a defamation plaintiff was held to have involuntarily (i.e., without purposeful action) became [sic] a limited purpose public figure, *Dameron v. Washington Magazine, Inc.*, 779 F.2d 736, 737-38 (D.C. Cir. 1985), and suggests to Your Honors through the introductory signal, "*see, e.g.*," that *Dameron* is simply one of many such examples that exist in the case law. *Id.* However, in truth, there are *not* many such cases.[7] The NCAA Defendants attempt to bolster the false impression they want to make by citing cases where courts have recognized that a defamation plaintiff may be recognized as a limited purpose public even when he or she did not desire to be a public figure, *id.*, at 61-62, and hope that this Court [21] will equate such language in the several cases cited as being examples of where an "involuntary" limited purpose public figure was recognized, when those cases *all* actually involved findings that the plaintiff was a "voluntary" limited purpose public figure.

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[20] [7] This conclusion regarding the *rarity* of an "involuntary" limited purpose public figure is borne out to be true by the legal research of the author of a law review article on the limited purpose public figure doctrine, who noted that [i]n the *forty years* since *Gertz v. Welch*, only about *nineteen* opinions have *mentioned* the "involuntary limited public figure" and that his "research uncovered only *four* such cases" where the courts found the plaintiff to be an involuntary limited purpose public figure. Christopher Russell, *Dragged into the Vortex: Reclaiming Private Plaintiffs' Interests in Limited Purpose Public Figure Doctrine*, 89 Iowa Law Review 1419, 1429 fn.'s 54, 55 (2004) (emphasis added). The *Dameron* case cited by the NCAA Defendants was one of the only *four* cases noted by the author.

Appendix F

The truth is that only in a very *few* instances have the courts of this country ever recognized a defamation plaintiff as an "involuntary" limited purpose public figure. The *rarity* of the "involuntary" limited public figure was foretold by the United States Supreme Court in *Gertz* when the Court stated:

> *Hypothetically*, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be ***exceedingly rare***.

Gertz, 418 U.S. at 345 (emphasis added). The decades of case law following *Gertz* prove the Supreme Court's prediction to be true. Just a few years ago, the Fourth Circuit Court of Appeals noted: "So *rarely* have courts determined that an individual was an involuntary public figure that commentators have questioned the continued existence of that category." *Wells v. Liddy*, 186 F.3d 505, 538 (4th Cir. 1999) (emphasis added). A decade before, the court in *Barry v. Time, Inc.*, 584 F.Supp. 1110, 1115, fn.6 (N.D. Cal. 1984), similarly noted that "several commentators have questioned whether this category maintains [22] any vitality."[8] Thus, the NCAA Defendants' argument that Cottrell and Williams became limited purpose public figures involuntarily is very *misleading* in that the Defendants fail to apprize Your Honors of exactly how rare it has been that such a status has been recognized in the case

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[22] [8] The *Barry* court cited to: Note, *The Involuntary Public Figure Class of Gertz v. Robert Welch: Dead or Dormant?*, 14 U.Mich.J.L.Ref. 71, 83 (1980); Robertson, *Defamation* and the *First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 Tex.L.Rev. 199, 222-23 (1976).

law. This is *not* one of those rare cases, and the NCAA's argument is without merit.

The true lesson to be taken from the *Gertz* opinion is that one does not become a "limited purpose" public figure involuntarily, so a "limited purpose" public figure is a person who has "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." 418 U.S. at 345. This test was further developed, and even *narrowed*, by three United States Supreme Court cases that followed thereafter.

2. Subsequent Cases Developing the *Gertz* Standard for "Limited Purpose" Public Figures.

a. Firestone.

The first of these three opinions was ***Time, Inc. v. Firestone*, 424 U.S. 448, 96 S.Ct. 958 (1976)**, which involved a defamation case by Mary Alice Firestone, the ex-wife of an heir to the Firestone tire fortune, against Time magazine for printing statements regarding her alleged [23] "extramarital adventures" that were made by her ex-husband during the divorce proceedings, and falsely stating that they were the basis for the court granting the divorce. 424 U.S. at 450-52. Time defended the case by arguing that Firestone was a public figure such that the *New York Times* standard applied, and that it was due a judgment because she could not demonstrate the publication was made with "actual malice." *Id.* at 452-53. Firestone won a jury verdict in a Florida trial court, and the verdict was upheld on appeal.

Appendix F

On certiorari review, the United States Supreme Court held that Firestone was *not* made a general purpose public figure by virtue of having been married to an heir of the Firestone fortune, or by her prominence in local Palm Beach society. *Id.* at 455. The Court held that she had *not* "thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it." *Id.* at 453. Finally, the Supreme Court *rejected* Time's contention that the public's great interest in the Firestone divorce and her direct involvement in the divorce proceeding was sufficient to make her a "limited purpose" public figure. The Court wrote:

> [Time] contends that because the Firestone divorce was characterized by the Florida Supreme Court as a "cause celebre," it must have been a public controversy and respondent must be considered a public figure. But in doing so [Time] seeks to equate "public controversy" with all controversies of interest to the public. Were we to accept [24] this reasoning, we would reinstate the doctrine advanced in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971), which concluded that the *New York Times* privilege should be extended to falsehoods defamatory of private persons whenever the statements concern matters of general or public interest. In *Gertz,* however, the Court repudiated this position. . . .

Id. at 454. Firestone was held to be a *private figure* despite the public's interest in the controversy. *Id.* at 455.

The *lesson* of *Firestone* is that just because an event or controversy is newsworthy or the public has great interest in it does not make it a "public controversy" within the

meaning of the test for application [sic] *New York Times* standard.

b. Hutchison.

The next of the cases before the United States Supreme Court was ***Hutchison v. Proxmire*, 443 U.S. 111, 99 S.Ct. 2675 (1979)**. The plaintiff was Ronald Hutchison, a behavioral scientist who had received research grants from several governmental agencies. 443 U.S. at 114. The primary defendant was William Proxmire, a United States Senator who had started a campaign to expose wasteful government spending by giving "Golden Fleece" awards to federal agencies he believed were funding wasteful projects. *Id.* Proxmire gave one of his awards to the agencies that had funded Hutchison's research and held a press conference where he described why he believed Hutchison's research was wasteful. *Id.* Hutchison then sued Proxmire for defamation based on the contention [25] that the summary of his research was inaccurate. *Id.* at 114-15. Proxmire argued that Hutchison, a professor and a director of a state mental hospital, was a limited purpose public figure and a public official, and in its order granting Proxmire summary judgment the trial court agreed. *Id.* at 118. The Court of Appeals affirmed. *Id.* at 121.

The Supreme Court noted that the lower courts' holding that Hutchison was a limited purpose public figure was based upon two factors, his "successful applications for federal funds and the reports in local newspapers that of the federal grants," and "Hutchison's access to the media," as evidenced by media accounts of his response to receipt of the Golden Fleece award. *Id.* at 134. The

Supreme Court, however, *disagreed* with the importance of those facts, stating: "Neither of those factors demonstrate that Hutchison was a public figure *prior to* the controversy engendered by the Golden Fleece Award; his access, such as it was, came after the alleged libel." *Id.* at 134-35 (emphasis added). The Court noted that "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." *Id.* at 135.

The Court held that Hutchison was *not* a limited purpose public figure and provided three reasons for its ruling. First, the Court held that "Hutchison did *not* thrust himself or his views into the public controversy to influence others." *Id.* (emphasis added). The Court [26] also noted that Hutchison had *not* "assumed any role of public prominence in the broad question of concern of public expenditures." *Id.* Finally, the Court found that Hutchison did *not* have "such access to the media that he should be classified as a public figure" because his access was limited to responding to the alleged defamatory statements. *Id.* at 136.

In sum, the *lesson* of *Hutchison* is that a defamation defendant *cannot* defame the plaintiff and then use the public interest and media coverage of the controversy created by the defamation to make the plaintiff a limited purpose public figure; the plaintiff must have injected himself or herself into a public controversy.

c. Wolston.

A third defamation opinion of the Supreme Court, ***Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 99**

S.Ct. 2701 (1979), was released on the same day as the opinion in *Hutchison, supra.* The plaintiff, Ilya Wolston, was the nephew of admitted Russian spies, and in 1958 he had been subpoenaed to appear before a federal grand jury investigating foreign espionage. 443 U.S. at 161-62. Wolston failed to appear, and his failure to do so caused him to receive some media attention, as well as an ensuing contempt of court proceeding, but he was never indicted. *Id.* at 162-63. However, years later Reader's Digest published a book titled "KGB" that named Wolston as a "Soviet agent." [27] *Id.* at 159. Wolston brought a defamation claim against Reader's Digest, who defended based on the contention that Wolston was a limited purpose public figure, primarily based upon the media coverage he had received previously for failure to appear before the grand jury. *Id.* at 160. The trial court granted summary judgment against Wolston, and the Court of Appeals affirmed. *Id.* However, the Supreme Court reversed the ruling and held Wolston was *not* a limited purpose public figure because he had *not* "'voluntarily thrust' or 'injected' himself into the forefront of the public controversy surrounding the investigation of Soviet espionage in the United States." *Id.* at 166. The Court stated: "It would be more accurate to say that [Wolston] was dragged *unwillingly* into the controversy" because "[t]he Government pursued him in its investigation." *Id.* (emphasis added).

In a point that is highly relevant to this appeal because of the arguments made by the NCAA Defendants and Culpepper in their appeal briefs, the Supreme Court further held:

> **A private individual is *not* automatically transformed into a public figure just**

> **by becoming involved in or associated with a matter that attracts public attention.** To accept such reasoning would in effect re-establish the doctrine advanced by the plurality in opinion in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811 (1971), which concluded that the *New York Times* standard should extend to defamatory falsehoods related to private individuals if the statements involved related to matters of public or general concern. **We *repudiated* that proposition in *Gertz* and in *Firestone*, however, and we *reject* it again today.** A libel defendant must show more than mere news-[28]worthiness to justify application of the demanding burden of *New York Times. See Time, Inc. v. Firestone,* 424 U.S., at 454, 96 S.Ct., at 965.

Id. at 167-68 (emphasis added). Additionally, the Court noted that Wolston had *not* assumed "'special prominence in the resolution of public questions.'" *Id.* at 168 (citation omitted).

Thus, the *lesson* of *Wolston* is that a private figure does *not* become a limited purpose public figure just by being associated with a matter attracting public attention. In order for a person to be a limited purpose public figure, he or she must have acted *voluntarily* and injected himself or herself into a public controversy in an attempt to influence its outcome.

3. Formulation of Various Lower Court Tests for Determining Who is a "Limited Purpose" Public Figure.

Following the above-noted landmark opinions on First Amendment defamation law by the United States

Supreme Court, the lower federal courts have attempted, with varying degrees of success, to create a simple test that could be used to determine when a defamation plaintiff is to be recognized as a limited purpose public figure. The case of ***Waldbaum v. Fairchild Productions, Inc.*, 627 F.2d 1287 (D.D.C. Cir.), *cert. denied.*, 449 U.S. 898 (1980)**, relied upon by both the NCAA Defendants and Culpepper, sets out one of those tests in a workable fashion. The *Waldbaum* court provided the following three-part test and guidance as to each of the elements (additional guidance from the [29] Supreme Court landmark opinions is also noted):

- ***Rule of Application*: "The court must examine these factors as they existed *before* the defamation was published."** *Waldbaum,* 627 F.2d at 1295, fn. 19 (emphasis added).

- ***Element 1*: "As the first step in its inquiry the court must [determine if there is a public controversy] and isolate the public controversy."** *Waldbaum,* 627 F.2d at 1296.

  Guidance:

  "A public controversy is not simply a matter of interest to the public. . . . " *Id.*

  "All controversies of interest to the public" are not "public controvers[ies]." *Firestone,* 424 U.S. at 454.

  "Newsworthiness alone will not suffice. . . . " *Waldbaum,* 627 F.2d at 1296.

"[The Court] should ask whether a reasonable person would have expected persons beyond the immediate participants in the dispute to feel the impact of its resolution." *Id.* at 1297.

"If the issue was being debated publicly and if it had foreseeable ramifications for nonparticipants, it was a public controversy." *Id.*

- ***Element 2*: "Once the court has [found and] defined the controversy, it must analyze the plaintiff's role in it."** *Id.*

Guidance:

"[The plaintiff] must have achieved a 'special prominence' in the debate." *Id.*

"The plaintiff must either have been purposefully trying to influence the outcome or could realistically have been expected, because of his role in the controversy, to have an impact on its resolution." *Id.*

"Responding to press inquiries or attempting to reply to comments on oneself through the media does not necessarily mean that a [30] person is attempting to play a significant role in resolving a controversy." *Id.* at 1298, fn. 31.

"Not everyone who participates in activities that affect the public becomes a public figure." *Id.* at 1300.

A public figure is one who "thrust[s] himself into the vortex of [a] public issue," and "engage[s] the public's attention in an attempt to influence its outcome." *Gertz,* 418 U.S. at 352.

Simply having public prominence in a community does not make a person a public figure. *Firestone,* 424 U.S. at 353.

"[R]egular and continuing access to the media . . . is one of the accouterments of having become a public figure," such that the absence of such media access is indicative of the plaintiff being a private figure. *Wolston,* 443 U.S. at 166.

A person is not made a limited purpose public figure by being "dragged unwillingly into [a] controversy" because "[t]he Government pursued him in its investigation." *Id.*

"A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention." *Id.*

A person does not become a limited purpose public figure by voluntarily taking certain action "knowing that his action might be attended by publicity. . . . " *Id.*

- ***Element 3:*** "Finally, the alleged defamation must have been germane to the plaintiff's participation in the controversy." *Waldbaum,* 627 F.2d at 1298.

Guidance:

"Misstatements wholly unrelated to the controversy, however, do not receive the *New York Times* protection." *Id.*

Where Cottrell and Williams part from the Defendants is not so much in the elements to be examined by the court, but in the *application* of the elements the facts and circumstances of this case. [31] The NCAA Defendants

and Culpepper would like this Court to apply the three-part test of *Waldbaum* outside of the context of the landmark Supreme Court opinions and thus without the benefit of lessons taught by the Supreme Court. They wish this Court to consider those elements based upon out-of-context excerpts of various lower court opinions which they contend support their argument that the Plaintiffs are limited purpose public figures. However, in the final analysis, this Court must recognize the *controlling precedent* of *Gertz, supra, Firestone, supra, Hutchison, supra,* and *Wolston, supra,* discussed in detail herein.

a. The Defendants Actually Want this Court to Apply the *Rosenbloom* "Public or General Interest" Test that Was Rejected by the United States Supreme Court.

The Defendants' strategy appears to be to give lip service to the *Waldbaum* test, and then apply what amounts to the "public or general interest" test created by the plurality in ***Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811 (1971)**, that was subsequently *rejected* a few years later. The *Rosenbloom* plurality opinion held that the *New York Times* "actual malice" standard applied to defamation claims "where the utterance involved concerns an issue of public or general concern," without regard to plaintiff's "prior anonymity or notoriety." *Rosenbloom,* 403 U.S. at 43-44. However, that legal standard was, as noted above, subsequently *rejected*

by the Supreme Court in *Gertz*, in [32] *Firestone*, and in *Wolston*.[9]

Even though the *Rosenbloom* approach of focusing solely on the existence of a public controversy is *not* the law, and has not been for more than thirty years, a review of the Defendants' arguments shows their aim is to convince Your Honors that the [sic] *no matter* that Cottrell and Williams were under NCAA "gag order" during the investigation of Alabama, *no matter* that they were not the focus of that investigation and were "dragged unwillingly" into [a] controversy" because the NCAA "pursued [them] in its investigation." 443 U.S. at 166, and *no matter* what else, their association with that public controversy is sufficient to make them limited purpose public figures.

The Fourth Circuit Court of Appeals has warned against a court falling prey to the idea that everyone associated with a public controversy is some type of public figure, when in *Wells v. Liddy*, 186 F.3d 505, 541 (4th Cir. 1999), it stated:

> There is a great *temptation* when evaluating a controversy as longstanding and significant as Watergate to allow the controversy itself to take precedence in the analysis and let it convert all individuals in its path into public figures. **The Supreme Court has admonished us strongly *against* allowing the public event with which the individual is connected to be the**

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[32] [9] *Wolston*, 443 U.S. at 167-68 ("We repudiated that proposition in *Gertz* and in *Firestone*, however, and we reject it again today.").

determinative factor governing an individual's public figure determination.

(Emphasis added).

[33] This Court must *reject* the temptation of letting the public controversy of the NCAA investigation take precedence over all other factors and make Cottrell and Williams limited purpose public figures just by laying in its path, and give reasoned analysis to the facts of this case, the nature of the defamatory statements made by the Defendants to each of the Plaintiffs, and the above-noted First Amendment defamation law. The Plaintiffs are private figures.

IV. COTTRELL AND WILLIAMS WERE PRIVATE FIGURES, *NOT* "LIMITED PURPOSE" PUBLIC FIGURES AS TO *ALL* THEIR CLAIMS.

The facts of record demonstrate that both the NCAA Defendants and Culpepper are responsible for various defamatory statements against Cottrell and against Williams. These involve the conspiracy "media leaks" by the NCAA Defendants against the Plaintiffs, the NCAA internet web site false statements that "show cause" orders had been placed on the Plaintiffs, and the various defamatory statements made by Culpepper. Because the nature of the facts and circumstances *differ* as to the various defamatory statements, the issue of whether Cottrell and Williams are private or limited purpose public figures must be addressed *separately* as to *each* claim, which the NCAA Defendants fail to do. However, the NCAA Defendants would have the Plaintiffs' status as

private or public figures determined singularly for differing types defamation claims made at different times.

In footnote 20 of the their brief, the NCAA Defendants cite to [34] cases in which they say "sports personalities" such as a college head football coach, a sports agent, and sportscaster had all been found to be "public figures," and imply that this Honorable Court should recognize a rule that a person who voluntarily undertakes a career involved with sports automatically becomes some type of a public figure. However, the United States Supreme Court has *repeatedly rejected* such "subject-matter classifications." *Hutchison,* 443 U.S. at 135; *Firestone,* 424 U.S. at 455-56; *Barry v. Time, Inc.*, 584 F.Supp. 1110, 1119, fn.10 (N.D. Cal. 1984) ("[I]t is improper to characterize certain positions as always being public, since such labeling is tantamount to making subject-matter classifications, which have been disapproved of by the Supreme Court.")[10]

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[34] [10] A comparison of the facts and holdings of the cases of *Barry v. Time, Inc.*, 584 F.Supp. 1110 (N.D. Cal. 1984), and *Warford v. Lexington Harold*[sic]-*Leader,* 789 S.W.2d 758 (Ky. 1990), which both involved allegations of improprieties in college basketball recruiting. Out of the large number of published opinions on defamation law, the cases are probably most similar factually to the facts and circumstances of this appeal and thus are instructive. In *Barry,* the court held that a college basketball head coach was a limited purpose public figure, 584 F.Supp. at 1118, while *Warford,* the court held that an assistant basketball coach was *not* a limited purpose public figure. 789 S.W.2d at 771. In both cases the plaintiff basketball coach was accused of using improper methods to recruit a star player. 584 F.Supp. at 1112; 789 S.W.2d at 759. While the court opinions differ in that the *Barry* Court found that a public controversy existed, 584 F.Supp. at 1116, and the *Warford* court did not, 789 S.W.2d at 769, the important distinction is how the two courts ruled based upon the facts relating to other issues.

(Continued on following page)

[35] A. Both Cottrell and Williams were *Private Figures* as to the Conspiracy "Media Leaks" that Occurred During the NCAA Investigation.

The NCAA Defendants and Culpepper want to convince Your Honors that the trial court was correct in granting summary judgment to them on this claim. The first issue to decide is the status of the Plaintiffs as either private or limited purpose public figures. At the time it granted partial summary judgment to the NCAA, the trial court held that Cottrell was a limited purpose public figure [C.12570], but that Williams was a private figure [C.12569-70], though the Court later ruled at trial that Williams was also a "limited purpose" public figure. [R.2585] The Defendants contend on appeal that both Cottrell and Williams were limited purpose public figures

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The federal district court in *Barry* held that the plaintiff was a limited purpose public figure because he had made a voluntary decision to become the "*head* basketball coach at a prominent university" and put himself at the center of public attention, 584 F.Supp. at 1118, and brought him "substantial media attention." 584 F.Supp. at 1121 (emphasis added). However, as noted, the Kentucky Supreme Court in *Warford* held that the plaintiff *assistant* basketball coach was a private figure rather than a limited purpose public figure, even though he had gotten his assistant coaching position at the University of Pittsburgh based upon his great "reputation as a recruiter" of high school players, 789 S.W.2d at 769, and even though he "received occasional press attention."

Accordingly, this Court may not take the view that Cottrell and Williams, once *assistant* football coaches at Alabama, are limited purpose public figures simply by having been involved in collegiate athletics. This Court is bound to review the facts and circumstances as to each of Cottrell's and Williams' claims and perform a separate analysis under the relevant legal standards, rather than make a ruling based simply upon their prior association with college athletics.

as to the conspiracy "media leak" claims based upon the amount of press coverage and public [36] interest that the NCAA investigation of Alabama engendered, the fact that they played some role in the investigation, and the media access that the Plaintiffs potentially had available to them *prior* to the investigation. However, given the facts of record as to this particular claim, one factor, the NCAA's "gag order" – not considered by the Defendants – rises in importance above all others and must be considered by this Honorable Court.

Finally, this Court must bear in mind that it is the *defendant* in a defamation suit that bears the evidentiary burden of demonstrating that the plaintiff is a limited purpose public figure. *Wells v. Liddy,* 186 F.3d 505,534 (4th Cir. 1999). Thus, the trial court erred to the extent it held that the Defendants met that burden.

1. The *Waldbaum* Three-Part Test is Useful, But in this Unique Case This Court Must Also Consider the Critical Effect of the NCAA "Gag Order."

The traditional three-part test for determination of whether a defamation plaintiff is to be considered a "limited purpose" public figure set out in *Waldbaum, supra,* and discussed above is not entirely appropriate as to the Plaintiffs' conspiracy media leaks claims because it does not include consideration of the very unique factor of the NCAA "gag order" on the Plaintiffs, which was discussed extensively in their original brief. Brief, at 76-82. However, each of the three elements are discussed below, although they are taken slightly *out of order* so [37] that the preclusive effect of the "gag order" on the Plaintiffs in

taking steps seeking to protect their reputations can be examined at great length.

a. Element 1 – Was There a Public Controversy?

As noted in Cottrell's and Williams' original brief, the defamatory conspiracy media leaks regarding them occurred *during* the NCAA investigation of the Alabama football program for recruiting violations that began publicly in November 2000. Cottrell and Williams do not deny that the NCAA investigation of Alabama, which lasted a little over a year, created a "public controversy," as that term was given meaning by the Supreme Court in *Gertz, supra.*

b. Element 3 – Was the Alleged Defamation Germane to the Public Controversy?

As noted in Cottrell's and Williams' original brief, the conspiracy media leaks that were defamatory against the Plaintiffs and/or portrayed them in a false light were related to the public controversy, as they portrayed the Plaintiffs as having committed very serious NCAA rules violations. Brief, at 83-86. However, the defamation of Cottrell and Williams was *not* the focus of public controversy, the focus was Alabama "booster" Logan Young. This was noted by the trial court in its summary judgment order when it stated:

> [T]he University of Alabama investigation is only *peripherally* related to this case. The conspiracy

> that is relevant is the conspiracy by the defendant[s'] to defame the [38] plaintiffs, and make them "the fall guys."

[C.12572] (Emphasis added).

c. Element 2 – The Plaintiffs' Role in the Public Controversy.

Cottrell and Williams are not limited purpose public figures as to the conspiracy media leak claims because they did not, and could not, achieve "special prominence" in the public debate, as required under the *Waldbaum* test. 627 F.2d at 1297. It is true that they were associated with the controversy by virtue of being assistant coaches at Alabama, but as the United States Supreme Court pointed out, "[a] private individual is *not* automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention." *Wolston,* 443 U.S. at 167 (emphasis added). This is so even if a plaintiff takes certain action *voluntarily*, knowing that the action may attract publicity. *Id.* This rule holds true even in the context of criminal conduct, as the Supreme Court has *rejected* the contention that "any person who engages in criminal conduct automatically becomes a public figure for purposes of comment on a range of issues relating to his conviction." *Id.* at 168.

Thus, even though Cottrell and Williams voluntarily accepted jobs as assistant coaches at Alabama, they did *not* therefore automatically become limited purpose public figures when a controversy *later* arose related to Albert Means signing a football scholarship to play at [39] Alabama. Here, like the plaintiff in *Wolston* held *not* to be a

limited purpose public figure, both Cottrell and Williams were "dragged unwillingly into [a] controversy" when the NCAA "pursued [them] in its investigation." 443 U.S. at 166.[11]

As noted previously, the Defendants bore the burden of establishing that Cottrell and Williams were limited purpose public figures, *Wells, supra,* and, thus, under the *Waldbaum* test they advocate, their *burden* of proof was to demonstrate, among other things, that the Plaintiffs achieved "special prominence" in the controversy regarding the NCAA investigation of the Alabama football program. The Defendants simply did *not* meet that burden and the trial court erred to the extent that it held that they did meet their evidentiary burden. The Plaintiffs simply could *not* have had any influence on the resolution of the public debate, *Waldbaum,* 627 F.2d at 1297, because the NCAA gag order, imposed *before* the defamation alleged in this claim, *prevented* them from speaking publicly.

The NCAA Defendants should *not* be allowed by this Court to impose a mandatory gag order on college coaches such as the [sic] Cottrell and [40] Williams under the threat of an "unethical conduct" charge, and then argue *hypocritically*, as they and Culpepper have in this appeal, that the Plaintiffs' failure to speak out to defend their

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[39] [11] A defamation plaintiff cannot be made a limited purpose public figure by a media defendant creating a controversy over the alleged defamation and thus create its own defense, *Hutchison,* 443 U.S. at 135, 99 S.Ct. at 2688; *Waldbaum,* 627 F.2d at 1295, fn.19, and here the Defendants should *not* be allowed to use media stories of false statements *they* leaked to the press to create the appearance that the Plaintiffs' role in the controversy was greater than it actually was.

reputations was voluntary, so that the "gag order" would have no effect on their status as defamation plaintiffs. The "gag order," however, enforced by the threat of an "unethical conduct" charge, is not something they could ignore, nor did they ignore. Original brief, at 76-82. Because of the "gag order," Cottrell and Williams are like the plaintiff in *Wolston,* in that during the NCAA investigation controversy they "never discussed [the] matter with the press and limited [their] involvement to that necessary to defend [themselves] against the . . . charge[s]" against them. 443 U.S. at 167. Like the plaintiff in *Wolston,* they "did not in any way seek to arouse public sentiment in [their] favor and against the investigation." 443 U.S. at 168. Thus, like the plaintiff in *Wolston,* the Plaintiffs are simply *not* limited purpose public figures.

2. The NCAA "Gag Order" Made Cottrell and Williams Private Figures as a *Matter of Law* During the Period of the Investigation.

Cottrell and Williams argued to this Court in their original brief that any access they had to the media because of their status as assistant football coaches at Alabama was *irrelevant* because, during the period of the NCAA investigation, they were *barred* by NCAA Bylaw 32.1.4 from making any public comment. They further argued that the [41] effect of the NCAA "gag order" required this Court to hold that they were *private figures* for that period of time because it *prevented* them using any possible media access – which a public figure would have – to protect their reputations. Original brief at 76–82; *Wells,* 186 F.3d at 534 (holding that the first element of the test

for a limited purpose public figure is "the plaintiff has access to channels of effecttive [sic] communication;").

Culpepper contends that Williams cannot make this argument because, he says, Williams "spoke with the media regarding the allegations concerning his involvement in the . . . recruiting of Means." Culpepper brief, at 67. Culpepper then argues that Williams cannot pick and choose when he wants to be bound by the "gag order," using it as a sword and a shield and that whether Williams cannot choose whether or not he is a limited purpose public figure. *Id.* at 67-68. The problem with this argument by Culpepper is that while citing to the record for the proposition that Williams spoke to the media,[12] he fails to refute the showing that Williams made previously on appeal that he declined comment to reporters many times during the investigation, Original brief, at 79, and that during the investigation Williams *denied* to Johaningmeier [sic] that he had made the statements attributed to him in the [42] newspaper articles cited by Culpepper. Original brief, at 81. One must assume that Johanningmeier believed him, or else the NCAA would have levied an unethical conduct charge against Williams for violation of its bylaws, which it did *not* do. Thus, Williams did *not* violate the "gag order."[13]

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[41] [12] Culpepper's citation to the record on page 67 of his brief is misleading, as he uses the signal "*See, e.g.*," to suggest that there are many more instances of such in the record, when there are not.

[42] [13] In the articles, NCAA Trial Exh. 252 and 253, published on the same day shortly after Alabama confirmed publicly that it was being investigated by the NCAA, Williams simply denied being involved with the allegations that a payment had been made to a high school coach to have a star player play at Alabama. Even if the trier of fact

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Appendix F

The NCAA Defendant and Culpepper fail to directly address the legal effect of the "gag order" imposed by the Plaintiffs' required compliance with Bylaw 32.1.4. **The NCAA's only response on this important issue is the *amazing* assertion that Cottrell and Williams *voluntarily* forewent making public comment during the period of the investigation.** The NCAA's brief states:

> Plaintiffs seek to minimize their clearly-established "access to the media" by constructing three (3) separate counter-arguments. First, plaintiffs assert that, during the investigation, their "media access" was interrupted due to their compliance with NCAA by-law, which they claim constituted a "gag-order." (Appellants' Br., pp.47-48; 61; [43] 76-82). This argument has no legal basis because it is *irrelevant* that the plaintiffs **chose** not to use their access to the media on some occasions.

NCAA Brief, at 80-81 (bold emphasis added).[14]

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were to believe that Williams made the few statements attributed to him, they are insufficient to show that he attempted to influence public perception during the NCAA investigation. In the *Waldbaum* opinion favored by [42] the defendants, the Court noted: "Responding to press inquiries or attempting to reply to comments oneself through the media does not necessarily mean that a person is attempting to play a significant role in resolving a controversy." *Id.* at 1298, fn. 31. Thus, even if Williams did make the few statements attributed to him in those two articles, they alone do *not* demonstrate that Williams took on the attributes of a limited purpose public figure.

[43] [14] The NCAA cites three opinions in which courts held that a plaintiff's *voluntary* decision to refrain from using media access to rebut alleged defamatory statements did not prevent the plaintiff from being held a limited purpose public figure. Of course, these opinions are *not* relevant to this Court's analysis because Cottrell and Williams were

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First, it should be noted that it is just not Cottrell and Williams who considered NCAA Bylaw 32.1.4 a "gag order"; the trial court used that specific term as well. In its summary judgment order, the *trial court* itself stated: "The plaintiffs were under a *gag order* by the University of Alabama and the NCAA. They made no comments to the media, and quietly sat back during the NCAA investigation." [C.12569] (Emphasis added.) Thus, as acknowledged by the trial court, Bylaw 32.1.4 effectively *prevented* Cottrell and Williams from making public comments during the NCAA investigation, when they otherwise could have possibly attempted to gain media access to answer the newspaper allegations and defend their reputations.

[44] **Next, it must be noted that the NCAA's position regarding the importance of the element of *media access* is in sharp *contrast* to landmark United States Supreme Court opinions.** According to the NCAA, the element of media access is not a critical factor in defining who is or who is not a public figure of some kind, such that persons like Cottrell and Williams, who could have no media access during the critical time when their reputations were at issue due to the NCAA gag

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prevented from speaking to the media by the NCAA's bylaws under threats of an unethical conduct charge.

The NCAA also cited *Price v. Chaffinch*, 2006 WL 1313178 (D.Del. 2006), an unpublished opinion of a federal district court in which that court held a state police officer who was under a gag order from his superior was still a limited public figure because, while the public [43] controversy at issue was still raging, he "actively interject[ed] himself into a situation in which, . . . , there was a substantial risk of public scrutiny and defamation." *Id.* at *6.

order, can still be public figures. This contention is inconsistent with statements of the United States Supreme Court, which demonstrate that the element of media access by which *self-help* can be obtained is highly important in determining that a person is a public figure. For example, in *Hutchison v. Proxmire,* 443 U.S. 111, 136, 99 S.Ct. 2675, 2688 (1979), the United States Supreme Court stated "regular and continuing access to the media . . . is one of the accouterments of . . . a public figure." Likewise, in *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 94 S.Ct. 2997 (1974), the Supreme Court recognized that media access was a key distinction between private figure and public figures. The High Court explained:

> [W]e have no difficulty in distinguishing among defamation plaintiffs. **The *first remedy* of any victim of defamation is *self-help* using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements then private [45] individuals normally enjoy.** Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.

418 U.S. at 344 (footnote omitted; all emphasis added).

Here, because of the NCAA-imposed gag order preventing Cottrell and Williams from speaking publicly during the period of the NCAA investigation, they were effectively *precluded* from using any access they might

have to the news media, such that they could *not* use the above-described "first remedy" of "self-help" to defend their reputations while there were media leaks from one or more members of the conspiracy at issue in this case.[15] The trial court's decisions to hold Cottrell and Williams to the higher burden of proof established for public figures to recover on the defamation claims added insult on top of injury, and this Court must recognize and correct that error.

a. Absent the Opportunity to Engage in a Self-Help Remedy to Protect their Reputations, Cottrell and Williams Were Private Figures as a Matter of Law.

As noted above, the United States Supreme Court has recognized the critical role that access to the media can play for a defamation victim in seeking to defend his or her reputation. **In *Gertz, supra*, the Supreme Court stated that "[t]he first remedy of any victim of** [46] **defamation is *self-help* using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation."** 418 U.S. at 344 (emphasis added).[16] Thus, the best

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[45] [15] This Court must *not* let the NCAA benefit from imposing a gag order on Cottrell and Williams and thus preventing them from attempting to defend their reputations while they were under attack, but then argue that it should have the greater protections of the elements of proof imposed upon public figures in large part because it says Cottrell and Williams had a history of media access.

[46] [16] American jurisprudence has a long tradition of favoring *self-help* as a remedy before seeking intervention by the state in the form of legal claim. For example, this Court has recognized that there is a

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response of a plaintiff to defamatory speech is actually *more* speech; *counter-speech* by the plaintiff to correct the lie or misstatement.

The concept of the counter-speech remedy was artfully expressed by Justice Brandeis in his special concurrence in ***Whitney v. California*, 274 U.S. 357, 47 S.Ct. 641 (1927)**, wherein he provided the foundational statement for the principle of self-help that was later expressed by the Supreme Court in modern defamation law through the recognition that a public figure would be afforded less protection because a public figure has media access to defend his or her reputation. Justice Brandeis explained: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is *more speech*, not enforced [47] silence." 274 U.S. at 377 (emphasis added).

The United States Supreme Court noted the supremacy of the approach argued for by Justice Brandeis in ***Brown v. Hartlage*, 456 U.S. 45, 102 S.Ct. 1523 (1982)**, where in a political campaign where one candidate sought to void the election results because of other candidates alleged violation of a state law forbidding a candidate from

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"longstanding rule that the law imposes upon all parties who seek recompense from another a duty to mitigate their losses or [damage]." *Harris v. Aranov* [sic] *Realty Co.*, 723 So.2d 610, 614 (Ala. 1998) (quoting *Avco Fin. Services v. Ramsey*, 631 So.2d 940, 942-43 (Ala. 1994)). A person generally has a duty to take affirmative action to mitigate his or her damages. *Carnival Cruise Lines v. Goodin*, 535 So.2d 98, 103 (1988). Owners of trademarks are required to police their marks or risk losing them. *Oberlin v. Marlin American Corp.*, 596 F.2d 1322, 1327 [46] (7th Cir. 1979).

stating that he or she would serve at a reduced salary if elected. In *Brown*, the Supreme Court wrote:

> Although the state interest in protecting the political process from distortions caused by untrue and inaccurate speech is somewhat different from the state interest in protecting individuals from defamatory falsehoods, the principles underlying the First Amendment remain paramount. Whenever compatible with the underlying interests at stake, under the regime of that Amendment "we depend for . . . correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz v. Robert Welch, Inc., supra,* 418 U.S. at 339-340, 94 S.Ct. at 3006-3007. In a political campaign, a candidates [sic] factual blunder is unlikely to escape the notice of, and correction by, the erring candidate's political opponent. **The preferred First Amendment remedy of "more speech, not enforced silence,"** *Whitney v. California,* 274 U.S. 357, 377, 47 S.Ct. 641, 648, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring), **thus has special force.**

456 U.S. at 61 (emphasis added). Thus, as one constitutional scholar has summarized: "Whenever 'more speech' could eliminate a feared injury, more speech is the constitutionally mandated remedy." Laurence H. Tribe, American Constitutional Law, § 12-8, at 603 (1978).

Here, however, "more speech" by Cottrell and Williams to protect [48] **their reputation was simply *not* possible.** The remedy of "more speech" was effectively *precluded* by the gag order imposed by the NCAA bylaws. Thus, during the NCAA investigation, the Plaintiffs simply did *not* have the opportunity that a public figure

would have to engage in the type of counter-speech remedy to the conspiracy media leaks that was described by Justice Brandeis in *Whitney, supra,* and later acknowledged by the Supreme Court in *Gertz, supra,* to be the defamation victim's first and best remedy. Accordingly, given that it was the NCAA that *imposed* the gag order, not some third-party, this Court should hold *as a matter of law* that Cottrell and Williams cannot be considered public figures as to claims arising from defamation attributable to the NCAA and the other members of the conspiracy and must be held to be *private figures* as those claims. *See Wells,* 186 F.3d at 534 (holding that the first element of the test for a limited purpose public figure is "the plaintiff has access to channels of effective communication.").

B. Both Cottrell and Williams Were *Private Figures* as to the NCAA Internet Web Site Defamatory Statements.

1. Element 1 – Was There a Public Controversy?

As noted in Cottrell's and Williams' original brief, the defamatory statements regarding them made on the NCAA internet web site were first published in February 2002 in its "Penalty Summary" on Alabama when the NCAA Committee on Infractions issued its final report on the investigation. Original brief, at 26-28,42-45. Of course, this [49] defamatory publication continued on for month after month [R.2602-03], with each day the defamatory statements appeared representing a new publication. At that time, there had been a complete turnover of the Alabama coaching staff because of the losing season in 2000, the NCAA investigation was *over*, the report of the

Committee on Infractions was issued without a finding that Cottrell and Williams had committed anything other than secondary violations, the sanctions had been announced, and the sanctions against Alabama, primarily for the actions of "booster [sic] Logan Young, were announced. Thus, the public controversy regarding the NCAA investigation of Alabama was *completed* at the time of the first publication. Accordingly, there was no longer a public controversy at the time of the first publication of the NCAA's defamatory statements, and certainly the controversy had to have ended by a short time following the initial publication, while the publication continued for months and months. Absent a current public controversy, Cottrell and Williams are plainly *private figures*.

2. Element 2 – The Plaintiffs' Role in the Public Controversy.

Assuming only for the sake of argument that this Court would conclude that the public controversy of the NCAA investigation of Alabama continued on after the completion of the investigation, the NCAA Defendants failed to meet their burden, under the *Waldbaum* test they themselves advocate, to demonstrate that the Plaintiffs achieved [50] "special prominence" in the controversy regarding the NCAA investigation of the Alabama football program. The NCAA simply did *not* meet that burden.[17] As

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[50] [17] It must be noted that the fact that, *after* the Committee on Infraction's report was made public, Williams made a public statement that he had been cleared of any major NCAA rules violations is *not* sufficient to make him a limited purpose public figure. *Hutchison*, 443 U.S. at 134-35.

is discussed above in relation to the conspiracy media leak claims, Cottrell and Williams were under a "gag" order for the period of the NCAA investigation, and like the plaintiff in *Wolston, supra,* who was held to be a private figure, did *not* speak to The press or otherwise attempt to arouse public sentiment in their favor and against the investigation. Thus, for the lengthy period of the NCAA investigation, before the defamation at issue here was published, the Plaintiffs plainly lacked the media access which has been noted by the Supreme Court to be an "accouterment" of a limited purpose or general purpose public figure.[18] This Court must hold that the Plaintiffs were *private figures* as to their claims against the NCAA [51] for defamatory statements published on its internet web site.

3. Element 3 – Was the Alleged Defamation Germane to the Public Controversy?

As noted above, the public controversy regarding the NCAA investigation of Alabama *ended* when the NCAA completed its investigation, so that the defamatory statements made by the NCAA on its web site were *not* related to a current controversy. This is particularly true as time

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[50] [18] "The court must examine these factors as they existed *before* the defamation was published." *Waldbaum,* 627 F.2d at 1295, fn. 19 (emphasis added). Thus, it is *not relevant* that after the defamation regarding the Plaintiffs was published on the NCAA internet web site the "gag order" ended and, theoretically, they could have gained media access. At that point in time, the Plaintiffs were no longer assistant coaches at Alabama, were unemployed, and no longer had any means to garner any media access until they eventually filed this suit. *See Wells,* 186 F.3d at 534 (holding that in order to be deemed a limited purpose public figure the plaintiff must have "retained public figure status at the time of the alleged defamation").

passed and the NCAA published the defamatory statements day after day for months on end. However, assuming for the sake of argument that there was still a public controversy, the NCAA's defamatory statements – that the Plaintiffs received the extreme punishment of issuance of a "show cause" order – did relate to the controversy. However, the plaintiffs would still be private figures because they did *not* thrust themselves into the public controversy in order to influence its outcome as the "gag order" prevented it.

C. Cottrell Was a *Private Figure* as to the Defamatory Statements Made Against Him by Culpepper on Which the Verdict Was Rendered.

The trial court first ruled that Cottrell was a limited purpose public figure as to the defamatory statements that Defendant Tom Culpepper made about him, then later ruled during trial, because of the narrowed scope of the statements held to be actionable, that Cottrell was a private figure. The actionable defamatory statements made by Culpepper regarding Cottrell can be summarized as follows: (1) that [52] Cottrell had abandoned his children in Tallahassee when he took the coaching job at Alabama and moved to Tuscaloosa, (2) that Cottrell had stolen videotapes from the Alabama athletic department, and (3) that he had embezzled money from the Shaun Alexander Foundation and a charitable golf tournament.

Culpepper argues that the trial court erred, and that Cottrell was a limited purpose public figure even as to the defamation claims that were submitted to the jury. Culpepper contends that Cottrell is a limited purpose

public figure because (1) he voluntarily took at job where there was a likelihood of a public controversy, (2) there was public controversy, (3) he was a "focal point" in the controversy, and (4) the defamatory statements submitted to the jury regarding abandonment of his children, as well as theft of property and money, were germane to the controversy "since the allegations and investigation of NCAA rules violations placed Cottrell's integrity, character and fitness to coach squarely at issue." Culpepper brief, at 96. This argument by Culpepper plainly stretches beyond recognition the requirement under *Waldbaum, supra,* that the defamatory statements be germane to the public controversy.

1. Element 1 – Was There a Public Controversy?

Cottrell has not denied that there was a "public controversy" involving the NCAA's investigation of Alabama's recruitment of Albert [53] Means. However, there was certainly no "public controversy," as that term is defined under First Amendment defamation law, regarding the morals or ethics of Ronnie Cottrell.

2. Element 2 – The Plaintiffs' Role in the Public Controversy.

As noted above, Cottrell is not a limited purpose public figure in relation to the public controversy surrounding the NCAA investigation of Alabama relating to the recruitment of Means because he did not achieve "special prominence" in the public debate, as required

under the *Waldbaum* test.[19] 627 F.2d at 1297. It is true that he was associated with the controversy by virtue of being an assistant coach involved in recruitment of players to Alabama. However, as the United States Supreme Court pointed out, "[a] private individual is *not* automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention." *Wolston,* 443 U.S. at 167 (emphasis added). This is so even if a plaintiff takes certain action *voluntarily* knowing that the action may attract publicity, he or she is *not* automatically made a limited [54] purpose public figure.[20] *Id.*

Thus, even though Cottrell voluntarily accepted a job as an assistant coach and recruiting coordinator at Alabama, he did *not* therefore automatically become limited purpose public figure when a controversy later arose related to Means signing a football scholarship to play at Alabama. Here, like the plaintiff in *Wolston* held *not* to be a limited purpose public figure, Cottrell was "dragged unwellingly [sic] into [a] controversy" when the NCAA "pursued [them] in its investigation." 443 U.S. at 166.

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[53] [19] Additionally, as is discussed above in relation to the conspiracy media leak claims, Cottrell was under a "gag" order for the period of the NCAA investigation, and like the plaintiff in *Wolston, supra,* who was held to be a private figure, did *not* speak to the press or otherwise attempt to arouse public sentiment in their favor and against the investigation.

[54] [20] This rule holds true even in the context of criminal conduct, as the Supreme Court has *rejected* the contention that "any person who engages in criminal conduct automatically becomes a public figure for purposes of comment on a range of issues relating to his conviction." *Wolston,* 443 U.S. at 168.

3. Element 3 – Was the Alleged Defamation Germane to the Public Controversy?

The defamatory statements made by Culpepper that Cottrell had abandoned his children in Tallahassee, Florida when he took a coaching job at Alabama and moved to Tuscaloosa, had stolen recruiting tapes from the Alabama athletic department, and had stolen money from the Shaun Alexander Foundation and/or a charity golf tournament were simply *not* "germane" to the public controversy regarding the NCAA investigation of Alabama. Culpepper argues that these defamatory statements, which are plainly *unrelated* to the NCAA investigation, are still somehow "germane" to the investigation because, he says, they involve [55] issues of moral character and honesty and that the investigation relating to Cottrell also involved such issues.[21]

While Culpepper's brief presents the details of certain allegations made by the NCAA against Cottrell during the NCAA investigation in an attempt to make it appear that his own defamatory statements about Cottrell to members of the media and ordinary members of the public were

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[55] [21] In support of this strained contention, Culpepper cites this Court to *Smith v. Huntsville Times Co., Inc.*, 888 So.2d 492 (Ala. 1988), and cases therein, involving public officials wherein it is held that any statements that "might touch on an official's fitness for office" are protected by First Amendment. The problem with this argument from a legal standpoint is, as Culpepper admits, the standard upon which this Court based its opinion in *Smith, supra*, applies strictly to the category of persons who are "public officials." Culpepper has *never* argued that Cottrell was a public official and, plainly, Cottrell never had such a status. Thus, Culpepper's reference to *Smith, supra*, and other opinions is *misplaced* and simply not relevant here.

somehow "germane" to the public controversy of the NCAA investigation, the testimony of law school professor Gene Marsh, Alabama's faculty representative to the athletic department, demonstrates that the defamations were not in any way relevant to the issues involving Cottrell in the investigation. Professor Marsh testified as follows regarding the role Culpepper had in assisting the investigation. Professor Marsh testified:

> A: [Y]ou can see from the memo that Tom Culpepper was never a major piece of our case from our perspective. . . . [Culpepper] was never the focus – I mean if I woke up during the investigation with thirty things on my mind, he was number forty-five, I mean because it was just not all that critical. . . .
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> [56] * * *
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> A: Let me explain how that happened. Stan and I, we were working on our response and Stan called me up or we were just talking one day about some other deal and he said what are we supposed to do with this guy, Tom? And I said well, I don't know. I will call Johanningmeier and ask. And I asked Rich, called him up and said now, what are we supposed to do with this guy? And he said he's a footnote. He is a nothing. We have got all this other stuff we have, that's what's become more important, the phone records, the bank records, Milton Kirk, Lynn Lang, the other coaches' testimony, all that stuff. And so that's exactly how we treated it. We just dropped him off.. . . . So from our perspective, we are going ahead and fashioning the

university's response and [Culpepper] is not in – he is not in our minds. He's not in.

* * *

A. But, I mean, you know, [Culpepper] clearly had a difference of opinion with Ronnie [Cottrell], but my deal with him always from beginning to end was not – **I mean, his focus was never on Ronnie Cottrell, it was always on the Logan Young deal and, frankly, I mean, I think that's what the NCAA ultimately, from start to finish, that's what his part was to speak to the Logan Young deal.**

* * *

A: But there was never any discussion with [the NCAA] about [Culpepper testifying against] Ronnie Cottrell. I mean the fact that he had conflicts with Ronnie Cottrell or whatever is – that's fine, but just, you know, he is the only guy that had some conflicts with Ronnie Cottrell, so whatever.

* * *

Q: **In these meetings that you have with Mr. Culpepper, do you ever remember Mr. Culpepper making any – any false or harsh statements about Ronnie Cottrell or Ivy Williams?**

[57] A: **No.** I mean, he – he explained, you know his upset with Ronnie and whatever.... **[Y]ou know, he didn't say anything that I could ever remember that was just – you'd say now that is, you know, a**

defamatory statement. I just don't remember any of that.

Q: Right.

A: **I remember the – Again, Rich Johanningmeier is not introducing me to Tom Culpepper because he wants me to get a sense of what's Tom Culpepper's relationship with Coach Cottrell, it's the Memphis deal.**

Q: Logan Young?

A: That is what he's about, sure.

[R.2762-65,2780,2782,2784] (Emphasis added)

Professor Marsh's testimony makes it clear as it can be that the defamatory statements about Cottrell that are the basis of the jury verdict against Culpepper were *not* "germane" to the public controversy of the NCAA investigation of Alabama because: (1) Culpepper, though apparently telling them to just about anyone he knew who would listen, did not share them with Gene Marsh,[22] and (2) Culpepper's role in the investigation was to assist the NCAA in tying Alabama "booster" Logan Young to the payment of money to high school coach Lynn Lang in order [58] to have Albert Means attend Alabama. Culpepper's role in the investigation was *not* to provide information that "might

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[57] [22] Culpepper did make one of the defamatory statements to the NCAA. The statement that "Ronnie Cottrell abandoned his wife and children in Florida" was made to Johanningmeier during a tape-recorded interview with Culpepper in August 2000. [C.7349] The statement was included in Johaningmeier's summary of the interview, and the interview summary was used by the NCAA in its investigation, as well as in the hearing before the Committee on Infractions. [C.7185]

touch on" Cottrell's moral or ethical fitness as a football coach. Thus, the defamatory statements at issue here, were simply *not* "germane" to the public controversy of the NCAA investigation of Alabama.[23]

V. THE TRIAL COURT CORRECTLY DENIED CULPEPPER'S POST-JUDGMENT MOTION FOR A JUDGMENT AS A MATTER OF LAW.

In his cross-appeal, Culpepper contends that the trial court erred in denying his post-judgment motion for a judgment as a matter of law on the claims on which the jury's verdict in favor of Cottrell was based. However, Culpepper does *not* contest that Cottrell met his burdens of proof if Cottrell is held to be a *private figure* and Culpepper's statements against him submitted to the jury are found to be on matters of *private concern*. Culpepper brief, at 83. Culpepper merely argues that Cottrell had a burden to prove constitutional actual [59] malice on his part because, according to Culpepper, (1) Cottrell was a limited purpose public figure as to the claims submitted to

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[58] [23] Moreover, if this Court were to hold that Culpepper's defamatory statements about Cottrell are "germane" to the public controversy of the NCAA investigation, then *any* controversy regarding collegiate athletics would create an opportunity for someone like Culpepper with a grudge against a college coach to gain the protection of the First Amendment for unlimited defamatory statements as long as the statements related to moral or ethical issues. So, instead of a statement that Cottrell abandoned his children or stole money, it could be that "Coach John Doe uses illegal drugs," or "Coach John Doe beats his wife and kids." The holding that Culpepper seeks, in order to transform Cottrell from a private figure to a limited purpose public figure on the claims that went to the jury and thus create a higher legal burden for Cottrell, opens a legal doorway that this Court should hold must remain closed.

the jury, and (2) even if he was a private figure, the defamatory statements were on matters of public concern. *Id.* As is demonstrated herein, and in Cottrell's Original brief,[24] none of Culpepper's arguments have merit and this Court must *affirm* the lower court's denial of his motion for a judgment as a matter of law.

A. The Trial Correctly Held that Cottrell was a Private Figure as to the Claims Against Culpepper and was *Not* Required to Show He Acted with "Actual Malice."

Culpepper's primary argument in his cross-appeal is that the trial court erred in its determination that, as to the claims allowed to be submitted to the jury, that Cottrell was a private figure rather than a limited purpose public figure. The proper resolution of the issue of whether Cottrell was a private figure or a limited purpose public figure issue is addressed in great detail above in section IV, and that discussion will not be repeated. However, the following points must be made in relation to Culpepper's arguments. Culpepper advocates the *Waldbaum* test for limited purpose public figures, but he fails to properly follow that test. However, he first seeks to enlarge *retrospectively* the public controversy of the NCAA investigation about [60] the recruitment of Albert Means that began in November 2000 to include the *secondary* violations of NCAA rules that involved Cottrell *prior to* the investigation.

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[59] [24] As is demonstrated in the detailed Statement of Facts section of the original brief that Ronnie Cottrell filed with this Honorable Court, Brief, at 37-41 and 45-47, he proved his claims against Culpepper with sufficient evidence to sustain the jury verdict.

Id. at 90. Although Culpepper is correct that Cottrell being suspended for certain secondary violations was noted in the media, *id.* at 91, 93, his suspension simply did *not* create a public controversy. The United States Supreme Court noted in *Firestone, supra,* that not all events that are of interest to the public are considered to be a "public controversy." 424 U.S. at 454. The *Waldbaum* court likewise explained that "[n]ewsworthiness alone will not suffice" to make a public controversy. *Waldbaum,* 627 F.2d at 1296. Thus, the public controversy at issue is the NCAA investigation that began in November 2000, and the remaining factors must be evaluated from that point, not as Culpepper advocates.

Culpepper argues that Cottrell is a limited purpose public figure simply by becoming an assistant coach and recruiting coordinator at Alabama in 1997. He argues that Cottrell became a limited purpose public figure when he "voluntarily placed himself in a position where there was a likelihood of public controversy." Culpepper brief, at 85. In essence, what Culpepper argues is that a limited purpose public figure is simply a public figure "light,"[25] and that a person can be a limited purpose public figure even when there is no current public [61] controversy, and that Cottrell became one when his position as recruiting coordinator at Alabama attracted some public attention and he had some degree of media access. *Id.* at 88,90. The error in Culpepper's argument is that a limited purpose public figure is by definition only a public figure for the limited purpose of his or her involvement in a public

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[60] [25] Culpepper has conceded that Cottrell has never been a general purpose public figure.

controversy. *Gertz*, 418 U.S. at 352. Thus, a person does not become a limited purpose public figure *before* a public controversy exists.

Culpepper also contends that Cottrell was a limited purpose public figure because as a coach at Alabama he had "significant access to the media." Culpepper brief, at 88. This argument, however, neglects to recognize the *preclusive* effect of the NCAA "gag order" on any potential media access that Cottrell may have had. This point is explained in great detail above in section IV.A.2. of this brief.

Finally, Culpepper argues that the defamatory statements he made about Cottrell on which the jury's verdict was based are "germane" to the public controversy because, he says, they relate to his "integrity, character, and whether he is fit to be a coach." *Id.* at 96. However, as is explained in detail in section IV.C.3. above, the defamatory statements that Cottrell abandoned his children, stole videotapes, and stole money were not germane to the public controversy of the NCAA investigation because the investigation's focus was NCAA rules [62] violations, not Cottrell's private life. In sum, the trial court correctly held that Cottrell was a private figure as to the defamatory statements on which the jury's verdict was based.

B. All of Culpepper's Defamatory Statements, Including that Cottrell had Abandoned his Children, were Defamatory Per Se.

Culpepper contends that the trial court should have granted him a judgment as a matter of law with regard to Cottrell's claims based on the defamatory statement that

Cottrell had abandoned his children in Tallahassee when he moved to Tuscaloosa because, Culpepper argues, the statement was not slanderous per se.[26] This argument, however, does not have merit because, among other things, he seeks an overly technical interpretation of the law where a statement is not slander per se unless it states the elements of a particular criminal statute. This is *not* the law.

It is well established that statements which impute to the person of whom they are made the commission of an indictable criminal offense involving "infamy" or "moral turpitude" constitute slander actionable per se.[27] *Ceravolo v. Brown*, 364 So.2d 1155 (Ala. 1978); *Marion v.* [63] *Davis*, 217 Ala. 16, 114 So. 357 (1927); Ala. Code 1975, § 6-5-180. Culpepper's statements that Cottrell *abandoned* his children imputes the commission of an indictable criminal offense under both sections 13A-13-4 and 13A-13-5. The statement implies, particularly when put in proper context, that Cottrell deserted his minor children, with no intention of providing any support or returning. Chapter

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[62] [26] Culpepper concedes that the defamatory statements alleging that Cottrell stole money and video tapes are slanderous per se. This is because it is long-established that statements imputing a crime of larceny falls are slander per se. *Phillips v. Bradshaw*, 167 Ala. 199, 52 So. 662 (1910).

[62] [27] When a defamatory publication is actionable per se, the law infers injury to reputation as a natural consequence of the defamation and, as a result, the plaintiff is entitled to presumed damages. Thus, imputations of indictable criminal offenses are slanderous per se and relieve the plaintiff of the requirement of proving "actual harm to reputation or any other damage" in order to recover nominal or compensatory damages. W. Prosser and W. Keeton, The Law of Torts, § 112, at 788 (5th ed. 1984).

13 of the Alabama Criminal Code sets forth indictable criminal "Offenses against the Family," and Ala. Code 1975, §§ 13A-13-4 and 13A-13-5 are applicable here. *Exhibit 1.* The slanderous statement made by Culpepper imputes violations by Cottrell of these indictable criminal offenses involving infamy or moral turpitude. These indictable criminal offenses involve "infamy" in that one who abandons his family will gain a bad reputation. Said alleged offenses at the very least involve "moral turpitude" given that said conduct is widely regarded as immoral by society regardless of the fact that they may be misdemeanors rather than felonies.[28]

[64] Culpepper's first argument is that his defamatory statement was not slander per se because, he says, what he had stated to persons was that Cottrell had abandoned his "family," not just his "children," and according to Culpepper, the criminal abandonment statutes are not applicable if one leaves the children with another adult, and the word "family" implies the children were left with his ex-wife. Culpepper brief, at 107.

Seizing upon certain language in *Butler v. Town of Argo,* 871 So.2d 1 (Ala. 2003), and *Anderton v. Gentry,* 577 So.2d 1261 (Ala. 1999), Culpepper argues that in order for a statement to be slander per se based upon the alleged

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[63] [28] **The abandonment statement is also slanderous per se also due to the fact that the words may possibly injure Cottrell in his reputation, profession, trade, or business.** *Gray v. WALA-TV,* 384 So.2d 1062 (Ala. 1980); *Johnson Publishing Co. v. Davis,* 271 Ala. 474, 124 So.2d 441 (1960). At least this is the position taken by Culpepper when he argued that the abandonment statement "certainly relate[s] to his character, integrity, and fitness as a coach." Culpepper brief, at 98.

commitment of a crime of moral turpitude the alleged statement must "describe the conduct defined in the Alabama Code section." Culpepper brief, at 107. In other words, Culpepper's contention is that one must state *all* the elements of the criminal offense in the defamatory statement, so, for example, in order to make a slanderous per se statement with regard to § 13A-13-5 one must used [sic] language indicating the person is deserting a child of less than eighteen years old with the intent to abandon, and that under § 13A-13-4 one must use language indicating the person is abandoning a family where the children have one sound parent to look after them but the [65] abandoning parent fails to provide financial aid. However, the trial court correctly rejected this overly technical analysis of the slander per se standard.

> THE COURT: Well, I don't think that you have got to state each and every element of the offense because, like if you accuse somebody of stealing, I think it would be – you could say somebody stole money, that would be enough. You wouldn't have to say that he took it with the intent to permanently deprive the owner thereof against the owner's permission.

[R.2895] The trial court was plainly correct, or else a person would practically have to read directly from a volume the Alabama criminal code in order to commit slander per based upon a statement asserting someone committed a crime.

Moreover, Culpepper's analysis appears to intentionally overlook the fact that there was testimony at trial that he had stated that Cottrell abandoned his "children," not his "family." Culpepper's argument that he said Cottrell

abandoned his "family" instead of saying "children" is in direct conflict with his own Statement of Facts, wherein he noted that the jury was charged that he had made a statement that Cottrell had abandoned his "children." Culpepper brief, at 14. **Moreover, the trial record demonstrates that Bruce Parris testified: "Another item [Culpepper] told me that day was that Ronnie had abandoned his *children* in Tallahassee to come to Tuscaloosa."** [R.1604] (Emphasis added.) Not surprisingly, Culpepper does not emphasize this [66] testimony because it conflicts with the argument he wishes to make regarding use of the word "family" versus "children." The above-noted statement by Culpepper to Parris regarding Cottrell clearly implies the violation of § 13A-13-5 and is slanderous per se. For all these reasons, the trial court did *not* err in failing to grant Culpepper a judgment as a matter of law as to the abandonment statement.

C. The Defamatory Statements Made by Culpepper Did *Not* Involve Matters of Public Concern and Thus Actual Malice Need *Not* Be Proven for the Damages Awards.

Culpepper argues that the defamatory statements he made about Cottrell that were submitted to the jury involved matters of public concern, such that Cottrell was required to provide evidence of "actual malice" in order to recover presumed or punitive damages. What is a matter of public concern in a defamation case is determined on a case-by-case basis. Whether a defamatory statement involves a matter of public concern "must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick v. Myers*, 461 U.S.

138, 147-48, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983); *Dun & Bradstreet*, 472 U.S. 749, 761, 105 S.Ct. 2939 (1985). The Eleventh Circuit has observed that "[i]f the relevant speech was motivated by personal concerns instead of public concerns then it is not protected by the First Amendment in this context." *Johnson v. Clifton*, 74 F.3d 1087, 1092 (11th Cir. 1996).

[67] Examination of the record here reveals that the content, form, and *particularly the context* of Culpepper's statements indicate that his speech was motivated by *personal concerns* rather than on a matter of public concern, and is thus not afforded First Amendment protection in this case. In order to appreciate the statements made by Culpepper to the NCAA and others, it is crucial to understand his relationship to Cottrell. Culpepper resented Cottrell because he had removed him from the preferential media list at Alabama and possessed a coaching job that Culpepper avidly sought. [C.5967,7822,8506,8509] The most alarming and telling evidence of Culpepper's desire for revenge was recorded during a telephone conversation he had with Rodney Orr wherein he stated that Cottrell "ruined me," and then he stated that his rule was "You slap me; I slap you back harder. That's how I work." [R.1298-1300; Pl. Trial Exh. 93B][29] Culpepper also told Charles Branch, "I'll do whatever it takes to see Ronnie Cottrell and Logan Young go under." [R.1441-42] Even at the end of his testimony during trial, Culpepper confessed,

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[67] [29] Cottrell urges this Court to listen to the telephone conversation between Culpepper and Rodney Orr to fully understanding the hatred and resentment Culpepper felt toward Cottrell. [Pl. Trial Exh. 93B]

"I didn't like Ronnie. I don't like Ronnie." [R.3129] These statements reveal Culpepper's clear personal motive to see to it that Cottrell would never coach again. [R.1420,1577-78]

The three defamatory statements submitted to the jury were nothing [68] more than mere rumors. It is Culpepper's motive and lack of good faith in publishing these rumors to others that prevents his statements from being matters of public concern. The facts here make this a model case for why it is important to consider the "content, form, and context of a given statement" and it is these same facts that set it apart from the cases cited by Culpepper. Statements imputing criminal conduct that are merely based on rumors and/or improper motives should not be a more protected form of speech than other defamatory statements not regarding criminal activity that are made in good faith. To rule to the contrary would encourage people with ulterior motives to defame another individual with an alleged criminal act instead of with a statement that does not involve a criminal act.

Furthermore, the public does not have a legitimate, articulable, or specific public interest in Culpepper's defamatory statements. The public does not have a legitimate interest in one's spreading of rumors about another individual to which he holds a grudge. Any interest in such affairs can be fulfilled by watching soap operas aired on public television rather than invading and interfering in one's private life. However, even if the statements had been made in good faith, which they were not, none of the statements involve a threat to public safety so in this

instance they do not involve matters of public concern, as that [69] term is used in defamation law.[30]

1. Alternatively, Cottrell Did Present Sufficient Evidence of Actual Malice by Culpepper.

Even if this Court should hold that Cottrell was a limited purpose public figure as to the defamatory statements made by Culpepper, or that the defamatory statements involved a matter of public concern, the verdict must still be upheld because Cottrell demonstrated by clear and convincing evidence that Culpepper acted with constitutional "actual malice." In ***Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 111 S.Ct. 2419 (1991)**, the United States Supreme Court provided a simplified discussion of the defamation plaintiff's burden of proof under the *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710 (1964), standard for constitutional actual malice. The Supreme Court explained:

> Actual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will. We have used the term actual malice as a shorthand to describe the First Amendment protections for speech injurious to reputation, and we continue to do so here. But the term can confuse as well as enlighten. In this respect, the phrase may be a fortunate one. In

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[69] [30] It is also important to note that while Culpepper paints his statements to have been made about an assistant football coach at a tax-payer funded University of Alabama, the football program is a self sustained program; thus, not supported by the tax payers of Alabama.

> **place of the term actual malice, it is better practice that jury instructions refer to publication of a statement with knowledge of falsity or reckless disregard as to the truth or falsity.** This definitional principle must be remembered in the case before us.

[70] 501 U.S. at 510-11; 111 S.Ct. at 2429-30 (citations omitted). Thus, Cottrell could meet the burden of proof for constitutional actual malice by presenting evidence that Culpepper made the defamatory statements with knowledge of falsity or reckless disregard as to the truth or falsity.

Though Culpepper, a media person, may not have acted with knowledge of the falsity of the statements, the evidence shows that he did act with "reckless disregard as to the truth or falsity." While a failure to investigate is not proof of such reckless disregard, evidence of the "purposeful avoidance of the truth" is sufficient to meet the standard of constitutional actual malice. *Harte-Hanks Communications, Inc. v. Connaughton,* 491 U.S. 657, 693, 109 S.Ct. 2678, 2698 (1989); *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 156-57, 87 S.Ct. 1975, 1992 (1967). Here, there is clear and convincing evidence that Culpepper acted with constitutional actual malice.

First, it must be noted that the defamatory statements that Culpepper made about Cottrell that are the basis of the jury verdict were slanderous per se, as demonstrated in section V.B. above. Culpepper admitted at trial that he made these slanderous per se statements about Cottrell with no knowledge of whether they were true or not, repeating what others had told him. [R.1165-66,1170] Culpepper further admitted at trial that he had made the

statements to other [71] media persons. [R.1191-92] Moreover, there was evidence presented to the jury that Culpepper had made such statements through 2000, that he and Cottrell had a meeting in October 2000 (with other persons present) where Cottrell had asked him to stop making such false statements, but that Cottrell did not stop and after December 2000 made the statements which served as the basis for the claims submitted to the jury. [R.1163,1168-741495,1497,1577-78,1604-05,1666,1730-31,2156,2158,3008, 3017] This set of facts – Culpepper making not just defamatory statements about Cottrell, but slanderous per se statements about him to many people, including media persons, without knowledge of whether the statements were true or false and after Cottrell had personally met with him and asked him to stop making such false statements demonstrates that Culpepper acted with reckless disregard for their truth or falsity. Given such trial testimony, the jury was presented with sufficient evidence to support the verdict against Culpepper even if the standard of constitutional actual malice would have been required.

VI. THE TRIAL COURT ERRED IN GRANTING A NEW TRIAL ON COTTRELL'S CLAIMS AGAINST CULPEPPER; THE JUDGMENT IS DUE TO BE AFFIRMED, WITH POST-JUDGMENT REVIEW OF THE VERDICT.

The trial court plainly committed reversible error by granting Culpepper's motion for a new trial. [R.3139] The court's order listed *three* reasons for ruling as it did. It first held that the jury's $30 [72] million award in compensatory and punitive damages was excessive, and that the "severely

flawed" verdict "could be cured by ordering a remittitur" except for two errors which the court held it had committed itself. [C.13895]

First, the trial court held that Culpepper was "prejudiced when the court changed the law of the case by ruling that plaintiff was not a [limited purpose] public figure at the close of the evidence." *Id.* The court further held that it had erred in allowing the case "to go to the jury on proof of common law malice," when in *Forrester v. WVTM,* 709 So.2d 23 (Ala.Civ.App. 1997), the "Court of Civil Appeals, in effect changed the law, to require proof of actual constitutional malice in any slander per se case" because the allegation of any "felony offense must be a matter of public concern." *Id.*

Because the trial was incorrect as to these latter bases it listed as reason for granting a new trial, it committed reversible error in granting Culpepper's motion for a new trial, and the case must be remanded back to the lower court for post-judgment review of the jury verdict.

A. The Trial Court Correctly Held At The Close Of The Evidence That Cottrell Was a Private Figure as to the Claims Against Culpepper Submitted to the Jury, and Culpepper Was Not Prejudiced By That Ruling.

As noted above in section V.A. above, the trial court was correct in holding at the close of the evidence, that Cottrell was a private [73] figure as to the defamatory statements that were submitted to the jury, a modification of its pre-trail [sic] ruling that Cottrell was a limited

purpose public figure. Cottrell argued in his original brief that the trial court erred in concluding that Culpepper was so prejudiced by the change to Cottrell's status that a new trial had to be granted. Culpepper contends in his brief that he was prejudiced by the change in Cottrell's status because: (1) his counsel would have made a different opening statement describing the legal standard appropriate to the case, (2) his counsel would not have asked Cottrell certain questions during the trial, and (3) his counsel would have "presented additional/different evidence and possibly called other witnesses," although Culpepper does *not* state what the evidence would have been or who the witnesses would been [sic]. Culpepper brief, at 80.[31]

First, it is worth noting that it was the Defendants who first *requested* the Court to alter, based upon the evidence presented at trial, its pre-trial determinations as to the Plaintiffs' legal status. At the close of the Plaintiffs' case, when the Plaintiffs could not present additional evidence or witness testimony, the Defendants moved [74] the trial court to modify its pre-trial ruling that Williams was a private figure, and re-characterize him as a limited purpose public figure. [R.2549-2563,2563-64] The trial court granted this request. [R.2585] This ruling *raised* Williams' burden of proof after he had rested his case, and

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[73] [31] Amazingly, Culpepper also argues that Cottrell's argument on this issue in his original brief fails because of brevity, being only "one-and-one-half pages" in length. Culpepper brief, at 81. Apparently Culpepper believes that a legal argument cannot be correct and controlling under the law unless some standard of page length is met, but he does not state the minimum length of that supposed briefing page requirement for a winning argument, leaving Cottrell's counsel and this Court to only guess.

caused him substantial prejudice. It was only after the motion by the Defendants to modify Williams' status that Cottrell moved the court to alter his status and conform it to the evidence presented at trial. [R.3139] Thus, it was the Defendants, including Culpepper, who altered the pre-trial status quo regarding the legal status of the Plaintiffs, and thus in a sense *invited* the alleged error of which Culpepper now complains. "A party cannot win a reversal on an error that party has invited the trial court to commit." *Neal v. Neal,* 856 So.2d 766, 784 (Ala. 2002). *See Mobile Infirmary Med. Ctr. v. Hodgen,* 884 So.2d 801, 807 (Ala. 2003).

As pointed out in Cottrell's original brief, if there was any error in the trial court waiting until the close of the evidence to modify its ruling and recognize Cottrell as a private figure on his claims against Culpepper it was merely *harmless error.*[32] This is [75] because even if the trial court's ruling had the effect of lowering Cottrell's burden of proof from having to show clear and convincing evidence of actual malice, Cottrell still *met* that higher burden based upon Culpepper's own testimony, rendering the ruling to be at most *harmless error*. *See* Original brief, at 101-102. This is further demonstrated by the fact that the jury awarded punitive damages, an indication that the jurors found that Cottrell met his burden of showing that Culpepper had acted with actual malice. *See Mid-America*

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[74] [32] It is recognized in the law that a litigant is only entitled to a fair trial, not a perfect one, because there will never be a trial free of any error. In *Chance v. Dallas County, Ala.*, 456 So.2d 295, 299 (1984), this Court noted that "reversible error does not find its source in mere imperfection, for litigants are not entitled to a *perfect* trial, only a *fair* one. (Emphasis original.) Culpepper received that fair trial.

Food Service, Inc. v. ARA Food Services, Inc., 578 F.2d 691, 701 (8th Cir. 1978) (holding in a defamation case that the trial court's failure to charge the jury on a conditional privilege asserted by the defendant was *harmless error* because the jury awarded punitive damages, necessarily finding that the defendant acted with actual malice); *Arroyo v. Rosen*, 102 Md.App. 101, 111-12, 648 A.2d 1074, 1078-79 (1994) (same); *Quality Granite Constr. Co. v. Hurst-Roche Engineers, Inc.*, 261 Ill.App.3d 21, 27-28, 632 N.E.2d 1139, 1143 (1994) (same); *Carter v. Wilhert Home Products, Inc.*, 714 S.W.2d 506, 513-14 (Mo. 1986) (same). Accordingly, the trial court erred when it held, incorrectly that the error which Culpepper argues for recognition of, would be reversible error.

[76] **B. The Trial Court Erred in Holding that All Statements that are Defamatory Per Se are Matters of Public Concern, such that Actual Malice was Needed to Recover Presumed or Punitive Damages.**

Without question, the trial court made a highly unusual ruling when it held in its order granting Culpepper's motion for new trial that the Alabama Court of Civil Appeals, in *Forrester v. WVTM*, 709 So.2d 23 (Ala.Civ.App. 1997), "in effect changed the law, to require proof of actual constitutional malice in any slander per se case" because the allegation of any "felony offense must be a matter of public concern." Cottrell pointed out in his original brief what Your Honors already know, that the Alabama Court of Civil Appeals *cannot* change the law of defamation because it is based upon United States Supreme Court opinions interpreting the First Amendment

to the United States Constitution. Cottrell also pointed out that the trial court grossly *misread* and misstated the holding in *Forrester,* Original brief, at 103-04, and that the trial court's ruling conflicts with this Court's opinion in ***Nelson v. Lapeyrouse Grain Corp.*, 534 So.2d 1085 (Ala. 1988)** (holding that the allegation that an employee stole from his employer was a matter of private concern), in holding that *all* statements which are slanderous per se are matters of public concern and require a plaintiff to prove his claim by constitutional actual malice.

Culpepper argues in his brief that it is "irrelevant" whether the [77] trial court was correct or incorrect when it stated that the Court of Civil Appeals had changed the law of slander. Culpepper brief, at 72. Culpepper tries to change the issue by stating that the point *Forrester* really stands for is that if the defamatory statement relates to a matter of public concern, the plaintiff must show constitutional actual malice in order to recover presumed or punitive damages. This misses the point that the trial court apparently felt *compelled solely* on account of its misreading of the *Forrester* opinion to hold that the slanderous per se statements made by Culpepper about Cottrell related to a matter of public concern because they imputed the commission of a felony. This Honorable Court must recognize the lower court's ruling as reversible error, even though Culpepper attempts to distract Your Honors from that error.

Culpepper contends that the trial court's reasoning is unimportant because, he argues, the court correctly held that the defamatory statements that Cottrell had abandoned his children and stolen property related to matters of public concern. Culpepper argues that this is true

because the statements were made in relation to Cottrell, "a highly-compensated, and high-level football coach at the storied, tax-payer funded University of Alabama." *Id.* at 76-77. Thus, what Cottrell seeks to do is *transform* the defamatory statements from matters of private concern to matters of public concern based upon the char-[78] acteristics of the *person* being defamed, rather than the content of the statement. This is not the standard to be applied.

The three defamatory statements at issue, though slanderous per se because they import the commission of a felony, like the alleged theft at issue in *Nelson, supra*, they do *not* involve a threat to public safety so in this instance they do not involve matters of public concern, as that term is used in defamation law. Thus, the trial court erred in holding that the defamatory statements submitted to the jury were on a matter of public concern.

C. The Jury's Damages Award May Be Reviewed By The Trial Court on Remand.

When this Honorable Court holds that the trial court erred in granting Culpepper's motion for a new trial and remands the jury's verdict of $6 million in compensatory damages and $24 million in punitive damages to the trial court for post-verdict review, the lower court will be then required to perform a post-judgment review of the damages awarded by the jury. One of the factors to be considered will be Culpepper's financial condition and his ability to pay a judgment. After the verdict, but prior to post-verdict discovery, Culpepper received a significant sum of money in the sale of stock [R.3485-86], yet testified during post-verdict to having a negative net worth. [R.3474]

However, as this Court is aware, during the litigation of this matter, Culpepper entered into an indemnity agreement with the NCAA [79] whereby under certain circumstances the NCAA agreed to pay the entirety of any judgment entered against Culpepper in this case. *Exhibit 2*. The indemnity agreement at issue is found in the written agreement between Culpepper and the NCAA settling any claims that he would potentially have against the NCAA. The contract is styled "Agreement and Waiver and Release of Claims," and it provides to Culpepper from the NCAA, certain rights of *indemnification* for attorneys fees in this litigation and a judgment rendered against Culpepper.[33] [C.13758-62] Thus, the indemnity agreement is key to the proper resolution of the post-judgment review of damages.

This Court has held that the existence and amount of a defendant's insurance coverage is a relevant factor for consideration by a court on judicial review of damages. *Cooper & Co. v. Lester*, 832 So.2d 628, 644 (Ala. 2001) (quoting with approval the relevant text of the lower court's order). Here, unlike with insurance, there is no dollar limit or cap to the indemnity agreement – even though the NCAA was plainly aware from the Plaintiffs' complaint that both compensatory and punitive damages were sought. In order to fully evaluate Culpepper's ability to pay, a decision will need to be rendered regarding the

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[79] [33] Ronnie Cottrell moved the court below for a jury trial on the meaning and effect of the Culpepper-NCAA indemnity provision in the settlement agreement, but the court did not rule on the motion and it eventually became moot when the court granted the Defendant's motion for a new trial.

[80] applicability of the Culpepper-NCAA indemnity provision prior to a *Hammond* hearing.

1. The Settlement Agreement is Clear and Unambiguous; therefore, the Court Should Rule on the Applicability of the Culpepper – NCAA Indemnity Agreement to the Judgment.

Because the indemnity provision is clear and unambiguous, Cottrell requests this Honorable Court to hold that the indemnity provision covers the awarded judgment in this case. The indemnity provision undeniably and very plainly states that the NCAA "agrees to indemnify and hold harmless Culpepper for *any and all judgments* which may be rendered against him in any litigation to the extent that such judgment is *based in whole or in part* on Culpepper's providing of information to and involvement as a confidential witness for the NCAA in the investigation of the above-referenced football infractions case." (Emphasis added.) [C.13760] To hold that this provision is not an "indemnity agreement" that covers the damages assessed against Culpepper in this case would be incorrect in light of the plain language of the agreement.

As set forth in the agreement, the NCAA agreed to indemnify Culpepper for "any and all judgments" based "in whole or in part" on Defendant Culpepper's providing of information to the NCAA during the investigation. At least one of the three defamatory statements that Culpepper made regarding Cottrell, which was submitted to the jury and [81] was the basis for the jury's verdict, was conveyed to the NCAA during its investigation. As set forth earlier in footnote 22, Culpepper told NCAA investigator Johanningmeier during his August 13, 2000 interview that

Cottrell had abandoned his wife and children. [C.7349] This allegation was then typed in Johanningmeier's interview summary and used throughout the NCAA's investigation of Alabama, most notably, in the NCAA Committee on Infractions hearing. [C.7185] Culpepper's conveyance of this allegation to the NCAA during the investigation and the NCAA's use and dissemination of said information clearly brings the defamatory statement within the purview of the indemnity provision. Thus, because the verdict is at the very least based in part on said statement, the verdict in its entirety clearly falls within the indemnity provision of the settlement agreement.

This interpretation is consistent with the fact that the NCAA has paid and continues to pay Culpepper's legal fees in this matter pursuant to the terms of the settlement agreement. Culpepper even testified in his post-judgment deposition that at the time he entered into the settlement agreement he believed the indemnity agreement to apply to *any* judgment rendered in this litigation. [R.3408-12; C.14006] Culpepper's testimony is consistent with the correspondence exchanged between counsel for the NCAA and counsel for Culpepper while the agreement was being drafted, particularly Culpepper's November 12, 2004 [82] letter to the NCAA wherein he stated that he understood the settlement to include indemnification for *any future liability* in connection this [sic] those cases referenced at the top of the letter, which included the present litigation. [C.13739-13762]

It is also important to note that in the instant case, Culpepper and the NCAA formally entered into their settlement agreement on November 2, 2004, nearly two

years after the litigation commenced. Thus, the parties to the settlement agreement were both well apprised of the nature and subject matter of the claims brought against the defendants at that time and of the potential liabilities that each defendant faced. Therefore, it cannot be said that the parties did not know what they were contracting for. If the parties had intended to narrow the scope of the agreement, then the parties would have included appropriate language, particularly given that learned counsel represented both parties. Upon review of the entire body of the agreement, and the manner in which the parties have behaved under the agreement, the parties' intentions and understanding of the agreement can be readily determined. See *Nationwide Mut. Ins. Co. v. Hall*, 643 So.2d 551, 556 (Ala. 1994) (talismanic or thaumaturgic language, such as a specific reference to the negligence of the indemnitee, is not necessary if the requisite intent is otherwise clear). Accordingly, [83] Cottrell requests that this Honorable Court hold that the indemnity agreement unambiguously applies to the awarded judgment.

2. Should the Court Find The Culpepper – NCAA Indemnity Agreement to be Ambiguous, There Must Be A Jury Trial on The Effect of the Agreement Prior to Trial Court Review of the Damages Award.

In the event that this Court finds there is ambiguity as to the terms of the indemnity provision, Cottrell requests that this Court instruct the trial court to hold a jury trial on the issue of whether Culpepper's indemnity agreement with the NCAA covers the verdict in this case. As one would expect, the NCAA has contended that the

indemnity agreement does not apply to the jury verdict, and argues on appeal that Cottrell cannot seek a jury trial on its interpretation. In its brief, the NCAA argues that: (1) Cottrell has no standing to seek such a trial on the indemnity agreement because, it says, he is neither a party to the contract nor a third-party beneficiary; (2) this Court has rejected a similar argument involving a defendant's bad faith claim against an insurer; (3) the procedural process would be lengthy; and (4) it could raise certain defenses, including that indemnity agreements for intentional conduct of punitive damages are void as a matter of public policy. An in-depth review of each of the arguments, however, reveals that they each are without merit.

[84] **a. Cottrell Was Plainly An Intended Third-Party Beneficiary of the Indemnity Agreement.**

The NCAA argues that there can be no jury trial on the meaning of the Culpepper – NCAA indemnity agreement because, it says, Cottrell does not have standing to seek such a trial. It notes that Cottrell is not a party to the agreement and also contends that he is not a third-party beneficiary of the agreement. In support of this contention, the NCAA cites this Court to only *Ex parte Scott Paper Co.*, 634 So.2d 546 (Ala. 1993), and *Colonial Bank of Ala. v. Bidley & Schweigert*, 551 So.2d 390 (Ala. 1989). **However, *neither* of the cases cited by the NCAA involved an indemnity agreement.** In *Scott Paper* this Court merely held that a worker was not an intended third-party beneficiary of an agreement between two companies for the contractor to carry worker's compensation insurance. 634 So.2d at

548. *Colonial Bank* involved a claim of accountant liability by the bank against the accountants for a company the bank had lent money, 551 So.2d at 391-92, where this Court held that the bank was not an intended third-party beneficiary to the contract for accounting services. *Id.* at 395-96. Both opinions merely repeat the black letter standard that a person is a third-party beneficiary of a contract only when the contracting parties intend to bestow a *direct* rather than an incidental benefit on that party. 634 So.2d at 548; 551 So.2d at 395.

[85] The standard is plainly met with regard to Cottrell. **The Culpepper – NCAA indemnity agreement was entered into during this litigation and expressly names the case below, with Cottrell's name listed in the case style, as one of the lawsuits to which the agreement is to apply: "(a) *Ronald W. Cottrell; Ivy Williams v. NCAA; Tom Culpepper, et al.* Circuit Court of Tuscaloosa, Alabama – CV 2003-810."** [C.13760] *Exhibit 2*. Thus, payment to Ronald W. Cottrell and/or Ivy Williams is expressly contemplated in the indemnity agreement.

In *Cincinnati Ins. Cos. v. Barber Insulation, Inc.*, 2006 WL 1577847 (Ala. 2006), this Court looked to the comments and illustrations from the Restatement (Second) of Contracts § 302 for examples from which to help it determine whether an entity was a third-party beneficiary of an indemnity agreement. In the present case, this Court can look to comment b, illustration 3 under § 302 for guidance. That illustration states:

> 3. **B promises A to pay whatever debts A may incur in a certain undertaking. A incurs in the undertaking debts to C, D and E. If the promise is interpreted as a promise that B will pay C, D and E, they are intended beneficiaries** under Subsection (1)(a); if the money is to be paid to A in order that he may be provided with money to pay C, D and E, they are at most incidental beneficiaries.

(Emphasis added.)

Review of the Culpepper – NCAA indemnity agreement demonstrates that under the attorney fee indemnity provision, which states "NCAA [86] agrees to pay Culpepper a sum of money . . . which will equal the total amount of his attorneys' fees and expenses which he had agreed to pay and is paying . . . " [C.13659], Culpepper's law firm is an incidental beneficiary to the agreement because it states that the money is to be *paid to Culpepper*; this is so even though the payment to Culpepper is made via a check made out to Starnes & Atchison, LLP.

The subsequent indemnity provision makes no mention of payments to Culpepper. Instead, it states: "NCAA further agrees to indemnify and hold harmless Culpepper for any and all judgments which may be rendered in any litigation. . . . " [C.13760] This indemnity provision implies payment *directly* to the owner of the judgment against Culpepper, making that person a third-party beneficiary of the agreement. This is supported by the agreement's use of the term "hold harmless." A "hold harmless agreement" is "[a] contractual agreement whereby one party *assumes* the liability inherent in a situation, thereby *relieving* the other party of responsibility." Black's Law Dictionary (5th ed.

1979), at 658. Thus, under this agreement the NCAA has promised to step into the shoes of Culpepper and be *directly responsible* for a judgment in any of the contemplated lawsuits. Thus, Cottrell is a third-party beneficiary of the indemnity agreement and has standing to seek a trial on the issue of whether the indemnity agreement applies under the facts and circumstances of this case.

[87] **b. The *Tillis Trucking Co.* Case is Easily Distinguishable.**

The NCAA argues that in *Tillis Trucking Co. v. Moses*, 748 So.2d 874 (Ala. 1999), this Court rejected an argument similar to that made on appeal by Cottrell. However, this opinion actually supports Cottrell's position. *Tillis Trucking* involved a wrongful death action brought against a trucker and his trucking company where the decedent's estate was awarded a $7 million verdict and a judgment was rendered. 748 So.2d at 876. During the trial Court's *Hammond* hearing, the court included Tillis Trucking's $1 million liability insurance policy as an asset, but *also* included as an asset the trucking company's pending bad faith claim against its insurer on a separate policy. *Id.* at 888. This Court recognized that the $1 million liability insurance policy was an asset, *id.*, but held that the bad faith action was too speculative, not because a trial was required, but because the *value* of the claim could not be determined with sufficient precision to be considered as an asset in a *Hammond* review. *Id.* at 887-888. Accordingly, this Court remitted the judgment to $1.5 million, the known value of the $1 million insurance policy plus the $500,000 in hard assets owned by the trucking company. *Id.* at 891.

Appendix F

The NCAA's reliance on the *Tillis Trucking* case is surprising because the case is easily distinguishable from this case in that the primary basis for this Court rejecting the bad faith claim as a *Hammond* [88] hearing asset is that its monetary value could not be determined with any certainty and was thus too speculative. Here, the value of the Culpepper – NCAA indemnity agreement is *not* speculative; it is *unlimited* and thus if applicable would cover 100% of the jury verdict. Moreover, in *Tillis Trucking* this Court again recognized the validity of a liability insurance agreement – the equivalent of an indemnity agreement – as a *Hammond* hearing asset. *Id.* at 888.

c. A Jury Trial On The Meaning Of The Indemnity Agreement Could Be Conducted Quickly.

Additionally, the NCAA argues that it could take "years" to complete the process of a jury trial "and an appeal" on the effect of the indemnity agreement on the verdict in this case. This argument *ignores* that important discovery has already been taken as to the issue of the meaning of the indemnity agreement and that a summary judgment motion is not needed nor is such proper at this stage. All that would be needed would be to impanel a jury and hold the trial. Thereafter, the interpretation of the indemnity provision made by the jury would be applied in the *Hammond* hearing and all the issues considered together in any subsequent appeal.

Here, Elsa Cole, the general counsel for the NCAA plainly stated that the question of whether the indemnity agreement applied to the jury verdict was dependent on the facts and circumstances of the trial and the NCAA

investigation. [C.13723-25] Under Alabama, such a jury [89] trial is proper to determine the meaning a provision in a contract separate and apart from the merits of other claims. *See Shearson Bros. v. Crisp,* 646 So.2d 613, 617 (Ala. 1994).

d. The Culpepper – NCAA Indemnity Agreement Does Not Violate Public Policy.

The NCAA argues that this Court should not order a trial on the application of the indemnity agreement because certain possible defenses that would void the agreement make the outcome of a trial too speculative for the indemnity agreement to be considered in a *Hammond* hearing damages review. This argument, however, is non-responsive to Cottrell's alternative request for a jury trial because Cottrell has requested the trial *prior to* the *Hammond* hearing, not after it. Thus, the validity of any defenses would be raised at trial and decided finally at that time so that the end result is that it would be known before the *Hammond* hearing that the indemnity agreement would cover any judgment against Culpepper or that would be inapplicable.

The NCAA cites this Court to *Industrial Tile, Inc. v. Stewart,* 388 So.2d 171 (Ala. 1980), and argues that the indemnity agreement is not enforceable because, it says, it does not clear [sic] and unequivocally indemnify Culpepper for his own acts of negligence or other misconduct. The NCAA further cites *Price-Williams Assocs. v. Nelson,* 631 So.2d 1016 (Ala. 1994), and *Alabama Power Co. v. Marine Builders, Inc.,* 475 So.2d 168 (Ala. 1985), and argues that indemnity agreements purporting to

[90] cover intentional misconduct or punitive damages are void as a matter of law because of public policy.

First, it must be noted that the issues noted above that the NCAA raises in this appeal are not issues proper to be decided here, but during the trial on the indemnity agreement in the lower court. However, it must be also noted that the NCAA's arguments are without any merit. While it is true that a contract will not be deemed a contract of indemnity and enforced unless it is expressed in clear and unequivocal terms, *City of Montgomery v. JYD Int'l, Inc.*, 534 So.2d 592 (Ala. 1988), one could hardly imagine an expression clearer of intent to create an indemnity agreement than the language found in the Culpepper – NCAA indemnity provision, which states: "NCAA further agrees to indemnify and hold harmless Culpepper for any and all judgments which may be rendered in any litigation. . . . " [C.13760]

Additionally, the indemnity agreement is *not* void because it does *not* run afoul of any public policy. The NCAA entered into the indemnity agreement with Culpepper during this lawsuit on the advice of its inside and outside counsel, long after Culpepper's conduct complained of by Cottrell had occurred, and subsequent to the last amendment to the complaint, so that the NCAA entered into the agreement with *full knowledge* of the types of claims and damages sought by the Plaintiffs [91] in this litigation.[34] Furthermore, the *Alabama Power Co.*

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[91] [34] One public policy reason against indemnity agreements is that they create an incentive for the indemnitee to prospectively forego due care in his conduct. *City of Montgomery, supra*, 534 So.2d at 595.

(Continued on following page)

opinion is *not* applicable in any way because it did not involve freely bargained-for contractual indemnity, but instead involved the issue of *common law* indemnity and contribution between *joint tortfeasors* on a third-party complaint. 475 So.2d at 171. The basis for this Court rejecting Alabama Power's argument for indemnity on punitive damages was that joint tortfeasors should each be responsible for an independent award of punitive damages. *Id.* at 180. That public policy reasoning is plainly inapplicable here.

VII. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENTS TO THE DEFENDANTS ON THE "CONSPIRACY MEDIA LEAKS" CLAIMS.

The trial court erred in granting summary judgment to the Defendants on Cottrell's and Williams' claims based upon leaks of false information by the NCAA, Culpepper, and the other members of the conspiracy (*see* Statement of Facts section in Plaintiffs' original brief) to the media regarding the Plaintiffs. The trial court did not address [91] the conspiracy media leak claims in any detail, but merely appeared to hold there that there was not sufficient evidence. [C.12572,12574]

The NCAA Defendants makes [sic] several arguments in their brief as to why it [sic] believe the trial court ruled correctly: (1) there is no evi-[92]dence that the members of a conspiracy intended them harm, and there can be no

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Because the indemnity agreement at issue here relates only to past conduct by Culpepper, this reasoning is inapplicable.

liability absent specific intent to harm the Plaintiffs (2) there is no evidence of a conspiratorial agreement among the Defendants, and (3) the defendants did not commit a wrong. The rebuttal to these contentions is not difficult.

A. The Trial Court Erred in Holding that the Plaintiffs Were Limited Purpose Public Figures as to these Claims.

As discussed in great detail above, the trial court erred to the extent it held that the Plaintiffs were limited purpose public figures as to these claims. A review of the facts of this case, particularly the fact that the Plaintiffs were under the NCAA "gag order" during the relevant time period, demonstrates that the Plaintiffs were indeed private figures.

B. The Members of a Conspiracy are Liable for all the Wrongs Committed in Furtherance of its Goal, Whether Originally Contemplated or Not.

First, a review of black letter law regarding civil conspiracies demonstrates that the NCAA Defendants misstate the law regarding the liability of members of a conspiracy to other persons. They cite several opinions of this Court for the proposition that a plaintiff may not recover damages against the members of a conspiracy unless the plaintiff proves that the original object of the conspiracy was to specifically harm the plaintiff, and that other injured parties have no recourse against the members of the conspiracy. NCAA brief, at 100-101. [93] The NCAA Defendants, as well as Defendant Culpepper, make this argument by pulling selective language from selective

opinions such as *Bayles v. Marriot,* 816 So.2d 38 (Ala.Civ.App. 2001), and providing emphasis to certain words in parenthetically quoted passages to imply intent in the law different than that which actually exists.[35]

If the law were as the NCAA Defendants and Culpepper say it is, then in a multi-party financial fraud conspiracy whose intent was to fool government regulators, no third-parties injured when the stock falls upon the regulator's eventual recognition of the truth could sue the conspirators for their damages. Instead, it is well-settled in the black letter law of this State that a member of a conspiracy is liable for the actions of other members of a conspiracy taken in furtherance of the conspiracy, even if the act was *not* the original intent of the conspiracy. For example in the nearly century-old case of *National Park Bank of New York v. Louisville & N.R. Co.,* 199 Ala. 192, 74 So. 69 (1917), this Court stated:

> "A doctrine applicable to civil as well as criminal cases is that where two persons enter into a combination to do an unlawful act, **whatever is done by one as the proximate consequence of furthering the main purpose of the conspiracy, whether specifically included in that purpose or not,** is the act of both and binds both to responsibility." Cooley on Torts, § 143; 8 Cyc. 645.

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[93] [35] The opinions cited by the NCAA Defendants, such as *Bayles, supra; Deal ex rel. Barber v. Hill,* 619 So.2d 1347 (Ala. 1993), do *not* involve fact situations like that found here with allegations of conspiracy causing injury to others in furtherance of the conspiracy.

> [94] That is to say, each conspirator is responsible for everything done by his confederates which the execution of the common design makes probable in the nature of things as a consequence, **even though such consequence was not intended as a part of the original design or common plan.**

199 Ala. at 192, 74 So.2d at 72. *See Skumro v. State,* 234 Ala. 4, 170 So. 776, 778 (1936); *De Bardeleban v. Sellers,* 17 Ala. App. 247, 250, 84 So. 403, 405 (1919). Likewise the Alabama Court of Criminal Appeals has more recently stated:

> "When two or more person [sic] enter upon an unlawful purpose, with a common intent to aid and encourage each other in anything within their common design, **they are responsible, *civilly* and criminally, for *everything* which may be conesquently** [sic] **and subsequently result from such unlawful purpose, whether specifically contemplated or *not*."**

Buford v. State, 891 So.2d 423, 429 (Ala.Crim. App. 2004) (quoting *Landry v. State,* 56 Ala.App. 421, 423-24, 321 So.2d 759, 761 (1975).

Thus, even though the original goal of the conspiracy was to bring NCAA sanctions on the Alabama football program rather than to specifically harm the Plaintiffs, because the media leaks regarding the Plaintiffs were done *in furtherance* of the conspiracy to [sic] in order to create adverse public opinion against Alabama so as to gain support for harsh sanctions and have them be the "fall guys," a term used by the trial court. [C.12572] The Plaintiffs may, accordingly, bring their claims against all

the members of the conspiracy. It simply does not matter that the original goal of the conspiracy was not injure Cottrell [95] and Williams specifically, as the black letter law of Alabama holds that liability is not limited by the breadth of the conspiracy's original intent.

C. A Conspiracy may be Proven by Circumstantial Evidence.

Next, the NCAA Defendants argue that the Plaintiffs did not demonstrate an agreement – a "meeting of the minds" – by the Defendants to enter into a conspiracy, and Culpepper makes a similar argument. Although the NCAA Defendants cite numerous opinions from this Court stating that the members of a conspiracy must all agree about their membership in it, they color their argument about the necessity of the meeting of the minds with the addition of the above-noted *false legal argument* that the conspiracy must have had the intent to injure the complaining party for liability to arise, to create a new legal standard that the Plaintiffs must have demonstrated that each of the Defendants must have individually agreed to enter into a conspiracy to injure them, as opposed just becoming member of the conspiracy to injure Alabama. NCAA brief, at 102-03. Of course, by incorporating the false legal argument noted above, the NCAA Defendants' argument regarding the degree of proof of the meeting of the minds of the conspirators is also *false*.

In relation to conspiratorial intent, all that the Plaintiffs had to provide evidence of was that the Defendants were members of the [96] conspiracy to bring NCAA sanctions upon Alabama. The existence of, and a person's membership in, a conspiracy, because of its secretive nature, may

readily be proven by *circumstantial* evidence and *inferences* thereon. *Luck v. Primus Automotive Fin. Servs.*, 763 So.2d 243, 247 (Ala. 2000); *Eidson v. Olin Corp.*, 527 So.2d 1283, 1285 (Ala. 1988) ("It is well settled, therefore, that a conspiracy may be established by circumstantial evidence and inferences drawn from the relationship of the alleged conspirators.")[36]

In *Foster v. State*, 43 Ala.App. 435, 438, 191 So.2d 523, 526 (Ala.Crim.App. 1976), the court provided a discussion of conspiracy law that undermines the NCAA Defendants' entire argument:

> It has been repeatedly held that it is ***not necessary***, in order that the fact of the conspiracy may be established, that it should be proved by evidence of an express agreement or compact between the alleged conspirators, or by direct evidence of any agreement or compact; **but that it *may* be proved inferentially, or by circumstantial evidence.** Conspiracies from their very nature are usually entered into in secret, and are consequently difficult to be reached by positive testimony, which renders it peculiarly necessary and proper to permit them to be inferred from circumstances. **Nor need it be shown that there was a prearrangement to do the specific wrong complained of.**

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[96] [36] The trial court held in its summary judgment order that there "was no clear and convincing evidence of a conspiracy" to defame the Plaintiffs. [C.12574] As noted above, the Plaintiffs need *not* have proven that the intent of the conspiracy was to defame them, *nor* prove its existence by clear and convincing evidence. This ruling was plainly reversible error by the trial court.

(Emphasis added; citations omitted). *See Turner v. Peoples Bank of Pell* [97] *City,* 378 So.2d 706 (Ala. 1979); *O'Dell v. State ex rel Patterson,* 270 Ala. 236, 117 So.2d 164 (1959). The evidence of a conspiracy involving the NCAA Defendants, Culpepper, and others that was presented in the Statement of Facts of Plaintiffs original brief provides abundant evidence of such intent. Original brief, at 17-22.

D. The Defendants Committed Actionable Wrongs.

In a rather short argument, the NCAA Defendants contend that the Plaintiffs' conspiracy media leaks fails because, they say, they did not commit an actionable wrong against the Plaintiffs and the trial court was correct is "dismissing" the conspiracy claim on this basis. NCAA brief, at 105. However, as noted in the Statement of Facts of Plaintiffs' original brief, and as discussed in the Argument section of that brief, at 82-87, Plaintiffs did present substantial evidence of leaks of false information to the media by members of the conspiracy described by the Plaintiffs in this case.

Defendant Culpepper argues in his brief that the Plaintiffs' argument that the trial court erred in granting summary judgment on the "conspiracy media leak" claims lack "the specificity to allow appellate review," Culpepper brief, at 35, and lack "any basis in law or fact." *Id.* at 36. However, Culpepper fails to specifically explain what he sees as the deficiencies in Plaintiffs' appellate argument on this issue, other than that he complains of the use of circumstantial [98] evidence, *id.* at 37, and he implies that he could not be a part of the conspiracy because, he says Plaintiffs have admitted that he did not want his information used

against Alabama. *Id.* at 38. However, use of circumstantial evidence (and even inferences thereon) is plainly *appropriate* under Alabama law to the [sic] prove the existence of a conspiracy, as is shown immediately above. Moreover, Culpepper's argument about the NCAA needing his permission to use his information against Alabama does *not* prevent him from being a member of the conspiracy, as his membership is demonstrated his *voluntary* assistance at the request of Tennessee Coach Phillip Fulmer, who originated the conspiracy, long *before* the NCAA ever began its official investigation. Moreover, the issue of whether the NCAA ever specifically used his information to support its sanctions against Alabama is irrelevant to the claims of the Plaintiffs relating to leaks to the media, of which Culpepper was then a member.

VIII. THE TRIAL COURT ERRED IN GRANTING JUDGMENT AS A MATTER OF LAW TO THE NCAA ON PLAINTIFFS CLAIMS BASED ON THE NCAA'S WEB SITE.

As this Court is aware, the NCAA published materially false and defamatory per se statements relating to the Plaintiffs in the Penalty Summary for the Public Infractions Report for the investigation of Alabama, which indicated that the NCAA had placed "show cause" orders on them. The trial court granted a summary judgment to the NCAA against Cottrell on this claim based on the ruling that he was a [99] limited purpose public figure, but denied summary judgment as to Williams' claims because the court held he was a private figure. [C.12567-74] At trial, the court ruled that Williams was a limited purpose public figure and granted the NCAA a judgment as a matter of law

on his claims. [R.2683-28] The NCAA defends the lower court's rulings by arguing that the court was correct in holding the Plaintiffs were limited purpose public figures and that there is no evidence that Cheryl DeWees, the NCAA employee who admitted to responsibility for publishing the defamatory statements information relating to the Plaintiffs, demonstrated an [sic] constitutional actual malice against the Plaintiffs. However, when the facts are viewed in the proper light, the rebuttal to these contentions is not difficult.

A. The Trial Court Erred in Holding that the Plaintiffs were Limited Purpose Public Figures as to these Claims.

As discussed above in section IV.A., the trial court committed reversible error in holding that the Plaintiffs were limited purpose public figures as to these claims. As private figures they did not have the burden of proving their claim with constitutional actual malice. With regard to Williams, not only was the trial court's ruling incorrect, the timing of it, after Williams' had concluding [sic] presenting his case, was even worse and by itself mandates reversal.

[100] B. The Plaintiffs Demonstrated that the NCAA Acted with Constitutional Actual Malice.

Even if the trial was correct in holding that Cottrell and Williams were limited purpose public figures as to these claims, they still demonstrated that the NCAA acted with "actual malice." The Plaintiffs have previously provided the facts regarding this claim with great detail,

Original brief, at 27-28,41-45, and cannot repeat all that information here. However, it can be summarized by saying that the NCAA published false and defamatory per se information related to the Plaintiffs in the Penalty Summary for the investigation on Alabama on its publicly-accessible internet web site that was re-published each every day for month after month, only making corrections after requested by the Plaintiffs. Moreover, the information was published without checking for error due to a rush to get it published, and was again never checked for error by the NCAA after its publication, even though hundreds of people work in the NCAA offices in Indiana, because there was no procedure in place to check for error. [R.599, 2603, 2673-74] These false statements were viewed by the public 2,217 times between October 13, 2003, and January 24, 2004, just a few short months. [C.12596] Finally, the NCAA never took any affirmative step to inform its member institutions, potential employers of the Plaintiffs, that it had published false information although correspondence with the institutions is routine. [R.2677-80] It merely posted a short [101] notice about the false statements for one or two days when they had finally been removed. [R.2677]

The NCAA makes several arguments seeking to support the trial court's ruling that Plaintiffs did not prove that it had acted with actual malice. Relying principally on the Supreme Court's *New York Times* opinion, the NCAA contends that such could not be proven because (1) there is no evidence that Cheryl DeWees had actual knowledge of the falsity of the publication and that she was at most, merely negligent, and (2) that its own "double-checking failures" cannot constitute actual malice.

Appendix F

The Supreme Court's opinion in ***Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975 (1967)**, is particularly instructive. The *Butts* case involved a defamation suit by the athletic director of the University of Georgia against the publisher of the Saturday Evening Post magazine in relation to an article that he had conspired with Paul "Bear" Bryant to "fix" a football game between Alabama and Georgia. 388 U.S. at 135. The trial ended with a verdict for Butts and, after a remittitur of the damages by the trial court, the Court of Appeals affirmed. *Id.* at 138-39. The United States Supreme Court held that there was sufficient evidence of constitutional actual malice by the defendant to support the jury verdict. *Id.* at 158. The Court explained that the publisher had "departed from standards of press [102] responsibility." *Id.* at 161. The Supreme Court stated:

> In this light we consider that the jury must have decided that the investigation undertaken by the Saturday Evening Post, upon which much evidence and argument was centered was **grossly inadequate under the circumstances.**
>
> * * *
>
> [T]he evidence is ample to support a finding of highly unreasonable conduct constituting **an extreme departure from the standards** of investigation and reporting ordinarily adhered to by responsible publishers.

Id. at 156, 158 (emphasis added).

Here, the evidence clearly shows publication of the defamatory per se statements by the NCAA that indicated Cottrell and Williams had been placed under a "show cause"

restriction by the NCAA was plainly the result of procedures for publication of penalty summaries on the NCAA web site that were "grossly inadequate under the circumstances," and "an extreme departure" from reasonable standards, given the highly sensitive nature of the information to be published. This is because the type of information that could be published, accidentally or not, includes statements such as a "show cause" order being placed on a coach, which can be devastating to his or her career. However, the NCAA had no procedure in place to prevent this from happening, despite the fact there is no reason why it could not do so. Apparently, it is because has no concern regarding the effect its statements can have on the college coaches whose lives cross paths with an NCAA investi-[103]gation.[37] Accordingly, even if this Court holds that the trial court did not err in concluding that Cottrell and Williams were limited purpose public figures, the judgments as a matter of law in favor of the NCAA must be reversed because the Plaintiffs presented sufficient evidence of constitutional actual malice.

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[103] [37] This is evidenced by the fact that in addition to releasing its report on the investigation of Alabama in February 2002, it also issued a "News Release" in which the NCAA volunteered that Cottrell was "under what the committee considered to be a *de facto* show-cause order" based upon Cottrell's inability to find a college coaching job during the investigation. [C.7870] Of course, Cottrell is still out of college coaching almost five years later, and may never again have a college coaching job. The NCAA obtained their goal.

IX. THIS COURT MUST ORDER JUDGE WILSON TO RECUSE.

In their original brief the Plaintiffs asked this Honorable Court to order Judge Wilson to recuse himself from any further proceedings in this matter based upon Canon 3.C.(1).(a) of the Alabama Canons of Judicial Ethics.[38] At that time, Judge Wilson temporarily recused until the resolution of the Alabama State Bar Association complaint he filed against one of the Plaintiffs' counsel; however, it now appears that this case has returned to Judge Wilson's docket. *Exhibit 3*.

[104] Judge Wilson has not filed a brief with this Court in relation to Plaintiffs' request for his recusal.[39] Culpepper did not address the issue in his recently filed brief. The NCAA Defendants ask this Court to allow "one of the Tuscaloosa County judges to tackle the recusal issue first." NCAA brief, at 109. Recusal, however, is an issue personal to a judge, and cannot be decided by another judge, except upon appellate review, so the NCAA's request does not make sense. The NCAA also uses its discussion of the issue in an attempt to tarnish Plaintiffs' counsel, arguing that the lawyer said "horrible things about a judge" on statewide radio and should not be allowed to use a retaliatorily-filed bar grievance as a tool to seek recusal. NCAA brief at 109. This bold accusation by the NCAA

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[103] [38] That Canon requires the recusal of a judge whenever his impartiality may be questioned, including when he or she may have a personal bias or prejudice such as that evidenced by filing a bar complaint against an attorney. *Ex parte Rollins*, 495 So.2d 636 (Ala. 1986); *Ex parte Robert B. Eubank*, 871 So.2d 862 (Ala.Crim.App. 2003).

[104] [39] Judge Wilson was given *notice* of the request for an order requiring his recusal by service of the Plaintiffs' original brief.

Defendants, however, is *not* supported by any reference to the bar complaint filed by Judge Wilson. This is because Plaintiffs' counsel did *not* ever criticize Judge Wilson personally, but only criticized his many curious rulings from the bench.

[105] CONCLUSION

Much has been argued in the lengthy briefs filed by the parties to these appeals, and it need not be repeated here. Cottrell and Williams simply ask this Court for an opportunity to present oral argument, and then a reasoned legal analysis of the issues on appeal. They are confident when such is done by Your Honors, (1) the judgment in favor of Cottrell against Culpepper will be *affirmed* with the case remanded to the trial court with a ruling that the indemnity agreement applies to the judgment below, or in the alternative that there must be a jury trial on the effect of the NCAA-Culpepper indemnity agreement on the judgment, and further post-judgment review of the damages award, (2) the claims on which the trial court granted judgments as a matter of law in favor of the NCAA Defendants and Culpepper will be reversed for trial, and (3) Judge Wilson will be ordered to recuse himself from all the proceedings following remand. With these rulings, Cottrell and Williams will know that there is a place where persons can go to get their reputations back – this Honorable Court's halls and chambers of Justice.

[106] Date: November 21, 2006.

RESPECTFULLY SUBMITTED,

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[107] **CERTIFICATE OF SERVICE**

I hereby certify that I have served the foregoing brief and corresponding exhibits upon all counsel of record, as indicated below, by placing a copy of the same in the United States mail, postage prepaid and properly addressed, this the 21st day of November, 2006.

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